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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 89

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AUTOMATIC CANTEEN COMPANY OF AMERICA,  
PETITIONER,

vs.

FEDERAL TRADE COMMISSION

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

PETITION FOR CERTIORARI FILED MAY 29, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

# SUPREME COURT OF THE UNITED STATES

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PETITIONER,

vs.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
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**BEFORE THE FEDERAL TRADE COMMISSION, ss:**

Docket No. 4933

In the Matter of AUTOMATIC CANTEEN COMPANY OF AMERICA

**CERTIFICATE OF SECRETARY**

I, D. C. Daniel, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings, except as hereinafter certified, had before the Federal Trade Commission in the above entitled matter, consisting of:

- Part 1—Pleadings (3-19-43 to 11-4-47, incl.).
- Part 2—Pleadings (11-5-47 to 8-24-48, incl.).
- Part 3—Pleadings (8-25-48 to 6-6-50, incl.).
- Part 4—Testimony (Pages 1 to 926, incl.).
- Part 5—Testimony (Pages 927 to 1849, incl.).
- Part 6—Testimony (Pages 1850 to 2813, incl.).
- Part 7—Testimony (Pages 2814 to 3767, incl.).
- Part 8—Testimony (Pages 3768 to 4621, incl.).
- Part 9—Testimony (Pages 4622 to 5668, incl.).
- Part 10—Testimony (Pages 5669 to 6591, incl.).
- Part 11—Testimony (Pages 6592 to 7400, incl.).
- Part 12—Exhibits—Original (Comm. Ex. 1 to 24, incl.).
- Part 13—Exhibits—Original (Comm. Ex. 25 to 49, incl.).
- Part 14—Exhibits—Original (Comm. Ex. 50 to 65, incl.).
- Part 15—Exhibits—Original (Comm. Ex. 66).
- Part 16—Exhibits—Original (Comm. Ex. 67).
- Part 17—Exhibits—Original (Comm. Ex. 68 to 100, incl.).
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- Part 21—Exhibits—Original (Comm. Ex. 166 to 178, incl.).
- Part 22—Exhibits—Original (Comm. Ex. 179 to 194, incl.).

- [fol. 2] Part 23—Exhibits—Original (Comm. Ex. 195 to 219, incl.).  
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 Part 33—Exhibits—Original (Resp. Ex. 1 to 9 incl.)

and separate original exhibits marked:

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That Commission Exhibits 67 (Z-52) and 202 (B-P), invoicees, were lost in course of trial.

That this transcript is certified to the United States Court of Appeals for the Seventh Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated June 6, 1950, entered by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 20th day of October, A. D. 1950.

D. C. Daniel, Secretary. (Seal.)

[fol. 3] BEFORE FEDERAL TRADE COMMISSION

COMPLAINT—March 19, 1943.

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described since June 19, 1936, has violated and is now violating the provisions of Section 3 and of Subsection (f) of Section 2 of the Clayton Act (U. S. C. title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint against the said respondent, stating its charges as follows:

Count I

Paragraph One: Respondent, Automatic Canteen Company of America, is a corporation organized and existing by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West North Bank Street, Chicago, Illinois.

Paragraph Two: Respondent is now and for many years last past — been engaged in the business of leasing and licensing automatic vending machines used in the dispensing of candy bars, chewing gum and nuts, hereinafter referred to as confection and nut products. Respondent is likewise engaged in the sale and distribution to lessees or licensees of said automatic vending machine of the confection and nut products vended in said machines, which products respondent purchases from various manufacturers and sells to said lessees in a manner and under terms and conditions hereinafter described. In connection with the leasing and licensing of automatic vending machines, and in connection with the sale and distribution of confection and nut products to the lessees thereof, respondent has caused, and still causes, said vending machines when leased or licensed and the said confection and nut products when sold to be transported from its principal place of business located in the State of Illinois to the lessees, licensees and vendees thereof located in various points in the several [fol. 4] states of the United States other than the State of Illinois, and in the District of Columbia, and said respondent now is and has been for more than five years last past

constantly engaged in commerce in said vending machines and said confection and nut products between and among the various states of the United States, the territories thereof, and the District of Columbia.

~~Paragraph Three: In the course and conduct of its said business in commerce, as aforesaid, said respondent is, and has been for many years last past, in competition with individuals, partnerships and corporations engaged in the manufacture, leasing, licensing and vending of automatic vending machines and with other individuals, partnerships and corporations who have been and are engaged in the manufacture, sale and distribution of confection and nut products, most, if not all, of which latter competitors manufacture and/or sell and distribute confection and nut products suitable for use in respondent's vending machines. Respondent would have been, and would now be, in more active and substantial competition with both said competing vending machine manufacturers, lessors and vendors and with said competing manufacturers and/or sellers and distributors of confection and nut products suitable for use in vending machines but for the restrictive conditions of respondent's contracts of license, lease and sale as herein-after more particularly set forth:~~

Respondent does not manufacture its own automatic vending machines but has said machines manufactured for it by other companies in accordance with specifications furnished by respondent. Respondent was organized in 1931, has enjoyed rapid growth and is now and has been for more than five years last past one of the largest concerns engaged in the business aforesaid. Respondent now has outstanding in numerous locations in 31 states of the United States, and under lease agreements hereinafter described, executed by and between respondent and some 140 lessees, numerous vending machines as follows: 88,856 selective candy machines, 27,735 standard gum machines, 37,487 selective nut machines, 50,976 selective gum machines, and an unknown but large number of standard candy machines and standard nut machines. That by reason of the rapid growth of respondent's business, as aforesaid, and by reason of the numerous machines outstanding under lease as aforesaid, respondent is a dominant factor in the [fol. 5] business of leasing and licensing vending machines;

however, such business of respondent is incidental to its business of selling and distributing confection and nut products to the lessees of said vending machines. The candy vending machines of respondent vend in excess of 200,000,000 candy bars annually. The nut vending machines of respondent vend in excess of 5,000,000 pounds of nuts annually. Respondent annually purchases from one supplier alone for resale to its gum machine lessees approximately 1,850,000 boxes (100 sticks to a box) of chewing gum. Respondent has leased and now leases its vending machines to its said lessees for specified nominal rentals; the rental charge on the selective candy machines varies from 25 cents to 37 cents per machine per period and the year is divided into thirteen periods. The leased terms of some types of respondent's gum machines are as low as four cents per period. Respondent derives little or no profit from the leasing of its vending machines, its principal source of profit being derived from the sale of confection and nut products to the lessees of its machines at terms provided for in said lease or at terms as later modified during the period of the lease by mutual agreement. The leases entered into by respondent and its various lessees covering said vending machines run for a fixed term of eighteen years without any right to terminate given to the lessees thereunder and provide that the lessees may use such machines only in a certain designated territory allotted by respondent as an exclusive franchise for the period of the lease. The approximate life and usefulness of respondent's vending machines, due to wear, deterioration and obsolescence, is approximately eight years or less than one-half of the term of the leases covering said vending machines of respondent. Pursuant to arrangements made by respondent or its said lessees, respondent's vending machines are located in industrial plants, service stations, garages and terminals, approximately 95 per cent, of such vending machines being in industrial plants. The lessees are required by respondent to pay to the owners of the locations a commission of 10 per cent on all sales made through said machines and in addition the lessees are sometimes required to pay an additional monetary consideration to the owners of choice locations. Respondent [fol. 6] maintains certain supervision over its lessees by

provisions in the lease agreement that said lessees shall follow standard practices of respondent with respect to methods employed in obtaining machine locations, in maintaining, reconditioning and servicing the machines, and in accounting and bookkeeping procedure, but said lease agreements expressly provide that the lessees are independent contractors and are in no sense the agents or representatives of the respondent.

Paragraph Four: The respondent, in the course and conduct of its business hereinbefore described in Paragraphs One, Two and Three, has leased and licensed, and is now leasing and licensing, its automatic vending machines for use in the several states and territories of the United States and in the District of Columbia on the condition, agreement or understanding that the lessees or licensees thereof will not use the said automatic vending machines to vend any confections, nut products or merchandise other than those purchased from respondent; and on the further condition, agreement or understanding that the lessees or licensees thereof, during the period of said leases, will not acquire, hold, use, operate, lease or otherwise deal with any automatic vending machines other than those of respondent; and on the further condition, agreement or understanding that if the lessees or licensees thereof fail to comply with the aforesaid conditions during a period of fifteen days after written notice from respondent, all rights of said lessees or licensees shall terminate, including the right to the use and possession of such automatic vending machines which may be thereafter immediately repossessed by respondent and removed by respondent from their respective sales locations or from the premises of said lessees or licensees; and on the further condition, agreement or understanding that the lessees or licensees thereof, upon the termination of said leases by lapse of time or by respondent, upon the breach of any of the conditions aforesaid, shall not own, lease or deal in any automatic vending machines of any kind or character, or sell any merchandise of any kind or character by means of any automatic vending machines within the franchise territory of such lessees or licensees for a period of five years after said termination of said leases.

Paragraph Five: The effect of said leases or licenses on the said conditions, agreements or understandings set forth

[fol. 7] in Paragraph Four hereof may be to substantially lessen competition or tend to create a monopoly in either or both of two lines of commerce, to-wit: (1) the leasing, licensing or selling of automatic vending machines between and among the several states of the United States and in the District of Columbia; and (2) the sale of confections and nut products suitable for use in automatic vending machines between and among the various states of the United States and in the District of Columbia.

Paragraph Six: The aforesaid acts, practices and methods of respondent constitute a violation of the provisions of Section 3 of the hereinabove-mentioned Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (Clayton Act).

## Count II

Paragraphs One to Three, Inclusive: As Paragraphs One to Three, inclusive, of Count II of this complaint, the Commission hereby incorporates Paragraphs One to Three, inclusive, of Count I hereof to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this Count.

Paragraph Four: Respondent in the course and conduct of its business more particularly described in Paragraphs One, Two and Three hereof, as a result of the restrictive covenants contained in its automatic vending machine leases, more particularly described in Count I hereof, is one of the largest distributors of confection and nut products to automatic vending machine operators in the United States, and in consequence is an important outlet to manufacturers of such confection and nut products who wish extensive distribution of said products throughout the United States.

Respondent in the course and conduct of its business, now and since June, 1936, has been in substantial competition with other corporations, individuals, partnerships and firms similarly engaged in the business of buying, selling and distributing confection and nut products, except in so far as such competition has been affected by the practices which are the subject of this Count. Respondent in its business of leasing automatic vending machines, of securing

additional locations for the lessees of said machines, of [fol. 8] increasing the number of its said machines outstanding under lease, and of supplying the lessee's thereof with confection and nut products for use therein, is in active competition with jobbers of candy who supply the retail candy trade and also with the retail customers of such jobbers.

Paragraph Five: Respondent and its competitors buy confection and nut products from a large number of manufacturers, jobbers and distributors located in the various states of the United States (hereinafter called sellers), representative of whom are the following:

The Curtiss Candy Company, Chicago, Illinois;  
Walter H. Johnson Candy Company, Chicago, Illinois;  
Williamson Candy Company, Chicago, Illinois;  
Bunte Brothers, Chicago, Illinois;  
D. L. Clark Company, Pittsburgh, Pennsylvania;  
Luden's, Inc., Reading, Pennsylvania;  
Nelster Candy Company, Cambridge, Wisconsin;  
Switzer's Candy Company, St. Louis, Missouri;  
Sperry Candy Company, Milwaukee, Wisconsin;  
Queen Anne Candy Company, Hammond, Indiana;  
Trudeau Candies, Inc., St. Paul, Minnesota;  
Wayne Candies, Inc., Ft. Wayne, Indiana;  
Chase Candy Company, St. Joseph, Missouri;  
Wm. Wrigley, Jr., Company, Chicago, Illinois.

Each of said sellers sell and distribute confection or nut products in commerce between and among the various states of the United States and the District of Columbia causing said confection or nut products to be shipped and transported from their respective places of business in the various states of the United States to respondent at its principal place of business in Chicago, Illinois, where respondent takes possession of all of its said purchases, to competitors of respondent, and to said competitors' customers located in the various states of the United States and in the District of Columbia. That the sellers located in Chicago, Illinois, make deliveries to respondent with the knowledge that a substantial portion of respondent's purchases is intended for the use of the lessees of the re-

spondent's automatic vending machines located in the various states of the United States other than the State of Illinois.

[fol. 9]. Respondent and respondent's competitors resell and distribute said confection and nut products in commerce between and among the various states of the United States and the District of Columbia, causing said confection and nut products to be shipped and transported from their respective places of business in the various states of the United States to their respective customers located in the various states of the United States and the District of Columbia.

Paragraph Six: In the course and conduct of their respective businesses as above described said sellers have been and are now being induced by respondent to discriminate in price between different purchasers buying said confection and nut products of like grade and quality in commerce for use, consumption and resale within the United States by charging said competitors of respondent higher prices than those charged respondent. Said discriminations in prices which favor respondent are not uniform on each confection and nut product sold or from each seller. Respondent pays such sellers from approximately 10 per cent to approximately 25 per cent less for said confections and nut products of like grade and quality than respondent's competitors pay said sellers, depending upon the confection and nut product and the seller, or either of them.

Paragraph Seven: The effect of said discriminations in prices as set forth in Paragraph Six hereof may be substantially to lessen competition between respondent and competing jobbers likewise engaged in the sale of candy either to vending machine companies or to retailers engaged in the sale and distribution of confection and nut products; to end to create a monopoly in respondent in the lines of commerce in which respondent and its competitors are engaged; and to injure, destroy or prevent competition with respondent in the resale of such confection and nut products of like grade and quality purchased from said sellers; and to injure, destroy, or prevent competition with the sellers granting said discriminations in prices to respondent.

Paragraph Eight: Respondent receives information as

to the regular prices paid by its competitors to said sellers for said confection and nut products, refuses to purchase said confection and nut products from said sellers unless it is granted prices lower than paid by its competitors, and accepts and receives such lower prices on said confection [fol. 10] and nut products and thereby and while engaged in commerce and in the course of such commerce as alleged in Paragraph Five hereof, is now and has been since June 19, 1936, knowingly inducing and receiving the discriminations in price alleged in Paragraph Six hereof.

Paragraph Nine: The foregoing alleged acts of said respondent are in violation of Section 2(f) of said Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and other purposes' approved October 15, 1914, as amended (U. S. C. Title 15, Sec. 13) and for other purposes.

Wherefore, the Premises Considered the Federal Trade Commission on this 19th day of March, A. D., 1943, issues its complaint against said respondent.

#### Notice

Notice is hereby given you, Automatic Canteen Company of America, a corporation, respondent herein, that the 23rd day of April, A. D., 1943, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

[fol. 11] Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 19th day of March, A. D., 1943.

By the Commission.

Otis B. Johnson, Secretary.

[fol. 12] BEFORE FEDERAL TRADE COMMISSION

ANSWER—Received May 11, 1943.

Now comes Automatic Canteen Company of America, a corporation, respondent in the above entitled proceeding, by Sanders, Gravelle, Whitlock and Howrey, and Miller, Gorham, Wescott & Adams, its attorneys, and for its answer alleges and states as follows:

## Count I

Paragraph One. Respondent admits the allegations of Paragraph One.

Paragraph Two. Respondent admits the allegations of Paragraph Two in so far as they relate to the interstate character of respondent's business, but respondent denies that the manner or terms or conditions of respondent's business are correctly described in the complaint.

Paragraph Three. Respondent admits that it is and has been engaged in commerce and that it has enjoyed rapid growth. Respondent admits that it does not manufacture its own automatic vending machines, that respondent was incorporated in 1931, and that its vending machines are located for the most part in industrial plants. Respondent denies the allegations of Paragraph Three concerning competition and the effect of respondent's business upon competition, concerning respondent's method of doing business, concerning the terms and provisions of respondent's lease agreements, concerning the number of respondent's lessees, and concerning the number of respondent's vending machines. Respondent denies that persons leasing vending machines from it are required by respondent to pay to owners of locations a commission of 10% on sales made through said machines, and denies that the life and usefulness of said machines are eight years.

Paragraph Four. Respondent admits that it leases and licenses its automatic vending machines and that such machines are used in various states and territories, but denies the other allegations of said Paragraph Four.

[fol. 13] Paragraph Five. Respondent denies each and every allegation contained in Paragraph Five.

Paragraph Six. Respondent denies each and every allegation contained in Paragraph Six.

Respondent denies each and every allegation of Count I of the Complaint not herein specifically admitted, and particularly denies that the effect of its leases, licenses, acts, practices or methods may be to substantially lessen competition or tend to create a monopoly, or to constitute any violation of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

#### Count II

Paragraphs One to Three, Inclusive. In answer to Paragraphs One, Two and Three of Count II, respondent adopts its answer to Paragraphs One, Two and Three of Count I, and makes the same a part of the answer to this Count as fully as if herein set out verbatim.

Paragraph Four. Respondent denies the allegations of Paragraph Four.

Paragraph Five. Respondent has at times during the period mentioned procured confection and nut products in large quantities from the companies listed and has distributed the same, but it is without sufficient knowledge, with respect to the remaining allegations of the paragraph to answer the same and therefore denies each and every allegation thereof.

Paragraph Six. Respondent denies the first sentence of Paragraph Six, and, being without sufficient knowledge with respect to the remaining allegations, denies such allegations.

Paragraph Seven. Respondent denies each and every allegation contained in Paragraph Seven.

Paragraph Eight. Respondent denies each and every allegation contained in Paragraph Eight.

Paragraph Nine. Respondent denies each and every allegation contained in Paragraph Nine.

Respondent denies each and every allegation of Count II of the Complaint not herein specifically admitted, and respondent denies that any act of respondent has been in violation of Section 2(f) of the Act of Congress approved June 19, 1936 entitled "An Act to Amend Section 2 of the

[fol. 14]-Act Entitled 'An Act To Supplement Existing Laws Against Unlawful Restraints and Monopolies and Other Purposes' Approved October 15, 1914 As Amended (U. S. C. Title 15, Sec. 13) and For Other Purposes."

Automatic Canteen Company of America, by Miller, Gorham, Wescott & Adams, One North La Salle Street, Chicago, Illinois; Sanders, Gravelle, Whitlock & Howrey, Shoreham Building, Washington, D. C., Attorneys for Respondents.

Robert T. Sherman, Everett Sanders, Of Counsel.

• • • • • BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S MOTION TO DISMISS—Received Aug. 4, 1947

Now comes the respondent—the Trial Attorney having closed his case—and moves to dismiss Count II of the complaint for the following reason:

1. Counsel for the Commission have not proved *prima facie* case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that respondent, who was the purchaser, "knowingly induced or received" price differentials which made more "than due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

[fol. 15] And respondent moves to dismiss Count I of the complaint for the reason:

1. That the Federal Trade Commission cannot, under section 3 of the Clayton Act, terminate and destroy the contractual rights of respondent's distributors, created by valuable long-term franchise agreements, when said distributors are not parties to the proceeding.

There is filed herewith, in support of this motion, a brief and an appendix.

It is requested that this motion be set down for oral argument before this Honorable Commission.

Respectfully submitted, Sanders, Gravelle, Whitlock & Howrey, Shoreham Building, Washington 5, D. C., Attorneys for Respondent.

L. A. Gravelle, Edward F. Howrey, Of Counsel.  
August, 1947.

\* \* \* \* \*

BEFORE FEDERAL TRADE COMMISSION

Commissioners: Robert E. Freer, Chairman, Garland S. Ferguson, Edwin L. Davis, William A. Ayres, Lowell B. Mason.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT—January 6, 1948

This matter came before the Commission upon the respondent's motion to dismiss the complaint herein, the answer to such motion filed by counsel in support of the complaint, briefs in support of and in opposition to the motion, including a brief filed by the National Candy Wholesalers Association, as intervenor, the report and recommendation of the trial examiner, and oral argument.

Respondent's motion, made at the conclusion of the Commission's case, assigns as grounds in support thereof (1) that the Commission cannot, under Section 3 of the Clayton Act, terminate and destroy the contractual rights of respondent's distributors, when said distributors are not parties to the proceeding and (2) that a prima facie case of respondent's violation of Section 2(f) of said Clayton Act, as amended, has not been established.

Count I of the complaint charges that respondent, in violation of Section 3 of the Clayton Act, leases its automatic vending machines to its distributors on the following conditions, agreements, or understandings, the effect of which may be to substantially lessen competition or tend to create a monopoly: (1) that the lessees will not use said vending machines to vend any merchandise other than that purchased from the respondent; (2) that the lessees, dur-

ing the period of the leases, will not acquire, hold, use, operate, lease, or otherwise deal with any automatic vending machines other than those of respondent; and (3) that the lessees, for a period of five years after termination of the leases, shall not own, lease, or deal in any automatic vending machine or sell any merchandise of any kind by means of vending machines within the franchise territories of the lessees.

The complaint seeks to impose no sanction upon any of respondent's distributors. The Commission is making no effort to cancel or otherwise affect the leases under which these distributors lease respondent's machines, except to the extent of enjoining the enforcement of conditions, inserted solely for the benefit of respondent, which the complaint charges to be illegal. The rights of the distributors to receive compensation out of the net profits resulting from the operation of the vending machines will not be disturbed by any order issued by the Commission, and said distributors have no title to or possession of any property that renders them either indispensable or necessary parties to this proceeding.

Count II of the complaint charges respondent with having knowingly induced or received discriminatory prices in its purchases of confection products in violation of Section 2(f) of the Clayton Act, as amended. As it relates to this charge, the evidence thus far introduced tends to [fol. 17] establish (1) that respondent has paid suppliers of its confection products substantially less than such suppliers charge to other purchasers of confection products of the same grade and quality who are competing with respondent; (2) that respondent has induced or received these differentials in price well knowing that it was being favored over competing purchasers; and (3) that respondent's practices in this respect have the effect of lessening competition and causing injury to respondent's competitors. Thus, a *prima facie* case of a violation of Section 2(f) of the Clayton Act, as amended, has been established, and the question whether the differentials which the respondent has knowingly induced or received make more than due allowance for differences in the suppliers' costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which the confection products are to

respondent sold or delivered need not at this stage of the proceeding be decided.

In view of the foregoing, the Commission is of the opinion that the respondent's motion to dismiss the complaint herein is without merit.

It Is Therefore Ordered that said motion be, and it hereby is, denied without prejudice to the right of the respondent to proceed with its defense.

By the Commission, Otis B. Johnson, Secretary.  
(Seal)

[fol. 18] BEFORE THE FEDERAL TRADE COMMISSION

Room 1123, New Post Office Building  
Van Buren & Canal Streets  
Chicago, Illinois

**Transcript of Proceedings—June 24, 1946**

Met, pursuant to notice, at 2:00 o'clock p. m., Central Standard Time.

Before: Charles B. Bayly, Trial Examiner

APPEARANCES:

Federal Trade Commission, by Austin H. Forkner, Esq., and Fletcher G. Cohn, Attorney,

Automatic Canteen Company of America, by Sanders, Gravelle, Whitlock & Howrey, Edward F. Howrey and Louis A. Gravelle, Shoreham Building, Washington, D. C.

COLLOQUY

Mr. Forkner: I would like to inquire of counsel whether they would care to make any admissions in regard to Count 1. There has been some discussion in connection with that count. If we could eliminate that count entirely from this hearing, we would like to do so.

Mr. Howrey: Indeed not. We are here to defend Count 1 with all the vigor in our possession.

In connection with this particular question, Mr. Gravelle and I, personally, since Thursday morning, have worked all day and every night going through the correspondence records of the company.

We have had five truckloads of records brought down from our warehouse to the company's offices. We now have stacked in the company's offices packing cases and file boxes which I think would fill this room and we would be glad to exhibit them to the Court if they should care to journey over there.

These particular letters which are sent out semi-annually requesting quotations are placed in the general correspondence files and we finally located a complete set for [fol. 19] one company as a sample of what they all show. We stand willing and ready to produce them, or all of them, if we can have the time.

I should think it would take three or four weeks of steady work of several people to dig those out. We do not think that counsel should need them because we have a sample and we will be glad to stipulate that similar letters were sent and similar letters were received, so the only purpose they could serve would be to give further information on prices which is already in the record, in Commission's Exhibit 2.

L. E. LEVERONE was therupon called as an adverse witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Your name is L. E. Leverone?

A. Yes.

Q. And you are the president of the Automatic Canteen Company of America?

A. Yes, sir.

Q. And how long have you been president?

A. Since December, 1944.

Q. And what capacity have you acted in that connection?

A. My chief duty has been the effort to secure products to be sold through our vending machines.

Q. How long have you been with the organization?

A. I am one of the founders.

Q. Have you been active in the management of the corporation before December, of 1944?

A. In August, 1942.

Q. Do these Canteen Distributors operate in specified territories?

A. Yes.

Q. Who specifies the territory?

A. Wherever the territory is available, the territory is granted to them. In other words, they have a certain territory which they operate.

[fol. 20] Q. That is granted by the respondent company?

A. By the company, yes.

Q. Now, does the company have any manufacturing facilities for vending machines?

A. None.

Q. Who were the organizers of the Automatic Canteen Company of America, the principal organizers?

A. Nathaniel Leverone, Walter E. Swanson, Frank H. Anderson and myself.

Q. Of those named, who still remain with the company?

A. L. E. Leverone and Nathaniel Leverone.

Q. Mr. Swanson is retired?

A. Yes.

Q. And Mr. Anderson is deceased?

A. Yes.

Q. Now, does the company maintain an engineering department?

A. Yes.

Q. What is the purpose and function of that department?

A. The development and improvement of our canteens—the development of new ones and the improvement of old ones.

Q. Now, are these canteens, there automatic vending machines, produced by your company by individual manufacturers in accordance with designs and specifications made by the engineering department of your company?

A. I would say largely so.

In other words; if I may clarify that, we will submit our designs to a manufacturer and he may suggest improvements, which they generally do; but they are our designs and they are manufactured according to our specifications.

Q. Now, is it true, Mr. Leverone, that the leasing of canteens is not looked upon by your company as a profit-producing factor of the business?

A. I can only express an opinion on that. I don't believe that it is, but I cannot tell you positively.

Q. Well, now, is that statement true, that appears on Commission's Exhibit 44 marked for identification and reading as follows: "As more fully discussed hereinafter, the company has not looked to the leasing of canteens, except drink canteens, as a profit-producing factor of the business?"

A. That is correct.

[fol. 21] Q. Do you have a committee now in buying your products?

A. No, sir.

Q. Who determines that?

A. I do.

Q. You determine that?

A. Yes, sir.

Q. And now, in buying candy, you buy candy from the Sperry Candy Company, don't you?

A. Yes, sir.

Q. You determine the price you are to pay for that candy?

A. No, sir.

Q. How do you negotiate for buying candy from, we will say, the Sperry Candy Company or any other candy company? What is your procedure?

A. I have not negotiated with the Sperry Candy Company or with anyone else. I ask them how much they can sell the candy for and accept the prices they produce to us.

Q. Do you do that through mail?

A. I call. I negotiate with Mr. Foster and call him on the telephone and ask him if he can give us any candy.

Q. Did you ever talk to Mr. Foster?

A. Over the phone several times. I have dropped in once and talked to him personally.

Q. Did you ever talk to Mr. Williamson, president of the Williamson Candy Company?

A. Yes, sir. But I never discussed prices.

Q. What have you discussed with him?

A. Raw materials, and his ability to take care of our requirements; and to see as to whether or not he might be able to speed out a little more of his products for us?

Q. You never discussed prices with him?

A. I never discussed prices with him at all.

Q. Have you ever talked to Mr. Schnering, president of Curtiss Candy Company about candy at different times?

A. Yes, sir.

Q. What did you discuss with him in that connection?

A. I only discussed supplying us with Mr. Schnering. He cut us out completely when I came with the company. When I came with the company we never got any candy because he adopted a new method of distribution by appointing distributors throughout the country. I tried to convince him after the war that we would need our business and induced him to ship to us. The matter of price was not discussed.

[fol. 22] Q. Not discussed?

A. No, not discussed.

And he resumed shipments to us as a result of my calling on him, which was nearly a year ago.

Q. Who discusses prices with these companies, if you don't discuss it with them?

A. We have not been discussing price. We have been getting the products and we accept their prices.

Q. Who does the discussion on price and determines the price from the angle of the Automatic Canteen Company of America?

A. We have been accepting the prices which they bill to us. We have not discussed prices. If there was any discussion of prices, I would be the one to do the discussing. We have in one or two cases.

Q. What cases are those—these one or two that you refer to that you discussed price?

A. We did not discuss price there. But I mean we have had goods offered to us. I can't even tell you the names of the companies. One concern in New York that wanted three and one quarter, for instance, and I just made the statement.

• • • • •  
Q. Now, will you name the companies that you have had personal dealings with, conferences with, either their buyer or the seller or the sales manager or their president, in connection with the buying of products?

A. All right. Fred Amend Company—

Q. Just a minute. May I specifically ask you if you have talked to Mr. Otto Beich or Mr. Carl Baer?

A. I have talked to Otto Beich.

Q. You have?

A. Yes.

Q. When did you talk to him?

A. I talked to him at fairly frequent intervals. I talked to him within two weeks ago.

Q. Now, your first conversation that you had with him in connection with the sale of candy from the Paul F. Beich Company—Do you recall when that might have been?

A. I can't tell you exactly, but I would say sometime in 1944.

Q. 1944?

A. The latter part.

[fol. 23] Q. Now, at that time, were you buying candy from him?

A. Yes.

Q. Did you enter an order for candy at that time?

A. No.

Q. You had already entered an order?

A. I have never entered orders.

Q. Who enters the orders?

A. Our purchasing department.

Q. Who directs the buying of candy?

A. It is under my supervision.

Q. It is?

A. Yes.

Q. Did you direct that candy should be bought from Paul,

F. Beich Company?

A. I would say no. We were getting supplies from Beich and they discontinued?

Q. They discontinued?

A. Yes.

Q. Who determines how much candy you need? Is that under your supervision?

A. Yes.

Q. It is?

A. Yes.

Q. Now, what was discussed with Mr. Otto Beich at that time in regard to the price?

A. The price was not discussed.

Q. Are you positive that if Mr. Otto Beich were on the stand and testified that there was a discussion of price—

Mr. Howrey: I object, your Honor.

Trial Examiner Bayly: The objection is sustained.

By Mr. Forkner:

Q. Who was the next man you had a discussion with in regard to price?

A. I have never discussed price with anybody on this list.

Q. Well, will you explain your answer for that? You are the buyer for the Automatic Canteen Company of America, aren't you? You direct the purchases of that candy, is that correct?

A. Yes.

Q. And then you mean to say that you never at any time discussed price with any of the officers or the sellers of any of these companies from which you buy products? Do you mean to say that?

[fol. 24] A. Yes, sir.

Q. You mean to sit there and tell me that you never discussed price?

A. Yes, sir.

I would like to explain why.

Q. I wish you would explain.

A. We are getting about 25 per cent of the products that we need. We are getting calls from all over the country telling us to get our damned machines off the place—

Trial Examiner Bayly: Just a minute. You are in a proceeding here and you will confine your language to English.

The Witness: All right.

Trial Examiner Bayly: Just a moment. The reporter will delete that reference, and let him restate his answer.

The Witness: They are asking us to take our machines out of the plants; that the employees are wasting time. And we have been kicked out of many plants because we have nothing to put into our canteens. Even since I have taken a hold of this my objective has been to get candy. Some of the machines go for weeks with nothing in them, and whatever the fellow wants to charge, as I have explained to you before—that they have put up the price and that that was out of line—but anything that is within reason—and none of these larger manufacturers ever put up anything that isn't in reason—we have been very glad to accept their prices. Our objective has not been as to prices, our objective has been, ever since I have been active with the company, to get products with which to keep our canteens operating.

By Mr. Forkner:

Q. You operate under O. P. A. ceiling which prevents you from paying over a certain amount that you previously paid, is that correct?

A. No, sir.

Q. What is the case?

A. Under O. P. A. we cannot, with concerns we have been dealing with where there is a definite price, but on concerns that we have not been dealing with that price does not prevail.

Q. Have you made application or has your company made application on two or three occasions for raises in the O. P. A. ceiling so that you can purchase more candy, if you know?

[fol. 25] A. I could only answer that by saying that I think so. But I could not answer it as a direct answer.

Q. In other words, your problem for the last few years has been getting the products?

A. It is to get products and it is still our problem.

• • • • •  
Q. Mr. Leverone, how do you make purchases of candy, nuts and gum? What is your method? What is your operation? How do you do it?

A. I make personal calls. Added to that list, I have added National Candy Company, National Biscuit Company, King Cole Candy Company, and I have added a bunch of concerns, and I have called on them and I have explained to them that we are very large distributors of candy bars and—

Q. What else?

A. We are the equivalent of a sampling organization. A fellow goes out—if I am not taking too much time—

Q. No.

A. (Continuing.) —a fellow goes up to a candy counter, and sees half a dozen nut bars or peanut bars and he has his mind set and takes the one that he wants. With our machine, a canteen that is hung on a bar, the fellow goes up there and wants, for example, a Hershey bar and there is no Hershey bar, he may come back with a package of raisins although he may want a Hershey bar.

Q. In other words, there is a lot of advertising?

A. Very definitely.

Q. In other words, you point that out in your soliciting?

A. Very definitely.

Q. And it reaches points that retail counters don't reach, is that right?

A. Correct. I would say one more word. Our sales are impulse sales. The fellow has no idea that he wants a candy bar. He just goes by and sees somebody else putting a nickel into the machine and he does the same thing.

Q. Then, too, you don't have to have salesmen call upon you in selling their candy. The firm does not have to send a salesman around, isn't that right?

A. No.

Q. In talking to the company, do you mention some of these factors that are involved?

A. Definitely.

Q. And you point out this advantage in selling the candy, gum or peanuts, do you?

[fol. 26] A. Yes.

Q. You point them out for what purpose—in order to get the candy?

A. To get the candy because we can give them distribution. And I have been asked time and time again, "if we will sell you now when you can't get candy, will you agree to handle our line when candy is plentiful?" and my answer invariably is, "I can't promise because I don't know. It is the fellow that puts the nickel in who determines. We will put it in there and give it a chance. If the bar is good enough it will sell."

Q. Do you mention in any of those conversations that you buy F. O. B. Chicago and, therefore, there is a saving in freight for the company?

A. No, I have not made that point at all. Our objective is to get candy.

Q. I see. And those are the advantages which you have pointed out to these prospective sellers in order to get your products and supplies?

A. Yes.

Q. Now, when you buy this candy, do you resell it to your distributors?

A. Yes.

Q. Is that the principal source of profit and income for your company?

A. Yes.

Q. And about how much of a mark-up is there on candy, in general, between what you buy it for and what you sell it for to the distributors?

A. I can't give you that.

Q. But that is your principal source of income?

A. Yes. Mr. Moore no doubt can give you that.

Q. Mr. Moore?

A. Yes.

Q. He is in charge of what?

A. He is the comptroller and now treasurer. He has charge of it.

Q. That applies, of course, to gum, peanuts and candy?  
A. Oh, yes.

Q. Now, when you buy from these companies, do you have it shipped directly to your office, your headquarters here; or do you have it shipped directly to the distributors?

A. Generally, it is directed to the distributor although every once in a while we will break a car. For instance, [fol. 27] let us say we are shipping a carload of Hershey bars to the Pacific coast. We will break it there and ship it to the other distributors on the coast.

Q. It is billed to you at your office here?

A. It is billed to us.

Q. How is the freight paid?

A. In many cases the shipper. It all depends upon the terms of purchase. In some cases, why, it is added into the cost and, in other cases, the shipper pays the freight.

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NATHANIEL LEVERONE was thereupon called as an adverse witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Forkner:

Q. Now—

Mr. Forkner: It is understood that Mr. Nathaniel Leverone will be available for further examination while he is in the ~~NYC~~ as required.

By Mr. Forkner:

Q. Now, give your full name and affiliation with the respondent, if you will?

A. My name is Nathaniel Leverone. My present position is chairman of the board of directors of the Automatic Canteen Company of America.

Q. Give your address please.

A. 1120 Lake Shore Drive, home address; office, Merchandise Mart.

Q. And how long have you been chairman of the Board?

A. Chairman of the Board, since the middle of 1929.

Q. And before that what position did you occupy?

A. President of the Automatic Canteen Company, following its inception in 1920, about the middle of the year, in 1939.

Q. 1939?

A. Yes.

• • • • •

Q. You were one of the original founders of this new method of distribution through canteens, this company?

[fol. 28] A. I wouldn't say we were founders. This business, as far as we know, probably was eighty or ninety years old, and it was through my interest in rackets, I mean, the suppression of rackets, that we saw this business, which had great opportunities, as far as we saw, never had been honest. As I have said publicly, that any single man that had ability and honesty and enough finance and willingness to work to carry it through—and that is what we said when we were trying to reform Chicago: "There is a great opportunity to sell an honest vending machine company, sell good sized candy bars, with honest machines, that would not take your money when empty, and to give service, so they would all be fresh."

I thought we could make a tremendous success. That was in 1927, and playing with that idea and in talking about it and checking up on various vending machines over the country, we never found one that we found was what we call honest, and so we decided in 1929 to start this business.

We actually started either in late July or early August of 1929 although of course we had no vending machines or canteens as we called them, delivered to us for sometime after. Incidentally, the word canteen was used to differentiate from vending machines which carried that onus, so in our organization a man is reprimanded if he uses any other term other than canteen.

Q. Did you find that important in connection with talking to suppliers such as the Wrigley Company or someone like that, to have the cleaner method of distribution than had been formerly the case?

A. Very important, and very enlightening. I talked to Phil Wrigley, and he said: "Do you mean to tell me you

don't want to sell this little tab gum, this small gum, which is cheaper." He said that that is what vending machines always wanted. I said that we would not sell anything in our canteens, that isn't the same weight, size and quality as you sell over the counter and he said that that was very refreshing and "we want to do business with you."

Q. Well, those things were mentioned to these different suppliers when you started your company and you began to get your suppliers?

A. We only mentioned to one company; we did not have the vision of course, to see some of these things. We [fol. 29] thought if we sold candy from one concern and featured that, we would be doing a great job, and we made a deal with the Curtiss Candy Company to sell only their candy bars.

Q. How long did that continue?

A. Until our sales all went to pieces, and I would say it was a period of a year, a year and a half, and we started to investigate why people did not buy any candy and they said they had gotten tired of the same brand of candy. One brilliant manufacturer said: "If you ate in a restaurant serving nothing but corned beef and cabbage, even though you are a native of New Hampshire, you would get pretty sick of it."

Q. Did you find, in going into that business, what helps and aids for distributors in help and training, and help in different kinds of securing—

A. We had no thoughts on distributors at the start.

We wanted to set up this business as an honest, efficient business that would build an ideal for the industry. There are real ideals back of this business. We wanted to set it up as our own, in Chicago, and we ourselves operate it.

Q. Until 1942?

A. No—wait a minute. You are right. We did. We continued to operate sometime in 1942, but our policy became, I would say in about the end of 1939, I am quite sure I am right, to set up distributors who under our supervision would carry on this same system of efficient distributors and honest distribution of nationally known providers of full size and fresh in quality, and then that is when we started these methods of trying to standardize our service and our methods of talking to people.

Q. Now, I want to confine your answers to a particular phase of your business, namely, the type of aids and assistance which you gave to your distributors, which I think is one of the main features of your business organization. I believe you have five or six divisions which are primarily set up to aid in some respect the local operator, who is called your distributor, is that right?

A. Yes, we call them distributors.

Q. Now, for instance, you did have what we call the new business department whose duty it was to secure national accounts?

A. Well, its duty was to secure accounts.

[fol. 30] Q. Accounts, period?

A. Yes.

Q. Mr. D. C. Letts I believe, was at one time head of that department?

A. Well, in name. I actually handled it.

Q. I understand that all the operations of the company have been more or less directed in recent years by you, is that right?

A. No, I am chief executive officer, but from the inception of the company we had three very definite divisions, and we three heads ran the business as an executive committee, but I as president, while I directed the policy specifically, I had everything to do with the obtaining of locations, with the handling of license fees and laws in connection that had to do with the industry, or with legislation, public relations. I handled all those specifically.

Q. Now, about this new business department, what did they do then and what was the purpose of that part of your business?

A. Well, that came out of what we originally called the sales department, which we felt was a misnomer. The sales department consisted of several men who called on industrial plants and garages and so forth and asked permission to place these canteens in, told them the benefits to their employees, and told them that a certain percentage of the sales would be given to them or donated, as is usually the case, to any charitable or welfare fund or anybody they designated. They did that.

Q. Were those locations turned over to the local distributor after the respondent obtained them?

A. Yes. Incidentally, our men tried to train the local distributors so he could do the same thing. We did not do it all the time for him.

Q. Is that in the same department?

A. Yes, that is what the new business department—that is a different name—we just could not feel it was a sales department and could not get a proper name, so finally called it the new business department.

Q. You also had an operating department covering standards of procedure for the installation of machines and the servicing, with weeks of training given to the distributors?

A. Yes.

[fol. 31] Q. At the home office, in the field. Is that a different department than the sales department?

A. Entirely so, yes.

Q. What was its function; to help the local distributor?

A. Its function first was to set up his headquarters, so he could handle his repairs and unpacking his canteen, shipping back the canteens and so forth. It also showed him how to put them on the wall, how to hang them up properly so they would stay, not to be dangerous, how to service the canteens, how to keep them clean and in sanitary condition and showed him how to repair his repair parts, and how he could repair some of this instantly on the location without taking them off, and then gradually over a period of many years, from the first year, we have added various things we have known, on sanitation, on efficiency, on places to put them; for instance, where the sun would not hit the candy and spoil it, oh, innumerable things of that kind.

Also, we carried out, through that, this idea of putting the men in uniform, not only to look clean and neat, but so they would be in very much of a contrast to the people in the plant, so a man could not stop and flirt with a goodlooking girl, to pry into some department, and get a secret, so he would stand out, don't you see.

Then we hit on the idea that men, that we found that were injured, when they said: "We don't want a vending machine in our plant," and we got sued three years ago for an injury, and we started a system of insurance, public liability and employees liability, and all that sort of thing, and we passed it down to the distributors.

We said: "You boys have to be protected and we shall help you on that." In other words, we said that we wanted to set up a standard of doing business, so when a man patronizes a canteen, say in some remote service station in Maine or a big industry plant in South Chicago, or a summer resort in Northern Michigan, he will know that he is getting the same quality, same standard of service, and fresh merchandise.

Q. Well now, you agree then that what your company does and did was to set up standards of procedure which was carried out by your distributors in almost every detail?

A. Yes. I wouldn't say that we originated all those. Many of the distributors originated these ideas and brought [fol. 32] them in and then we submitted them at group meetings and tried them out, and if we all agreed they were feasible and advantageous, then we adopted them, and they became part of that manual of standard practice.

Q. However, your distributors are quite separate from the company and are independent contractors?

A. They are absolutely independent people, only they do as we please.

Q. At the same time, the details of operation are controlled by the terms of your contract?

A. Most of them.

Q. What is this 80 per cent standard of the U. S. they have to adhere to, that is in the contract on production or operation?

A. I don't know that.

Q. Isn't there a standard that individual distributors have to adhere to, which is .80 per cent of general average for the United States?

A. I think you must be referring to—

Q. Do you know what I am referring to?

A. I think so. It is obsolete. Back early in the business we used to publish a monthly report of the sales of every distributor, and it was sent to every distributor so he could see how he stood in this list. At that time, there were maybe forty or fifty distributors and nobody wanted to be in the lower tenth, of course, but I don't believe there was any attempt to enforce anything. I don't know how you could. But what we did, the man in the lower end, we would

send in help to him, without cost to him, to try to get him up higher.

Q: Well, by reason of the high standards, which the Automatic Canteen Company set up, Mr. Leverone, in your opinion, that was an advantage to the supplier to have his products sold in that fashion through that method, is that right; is that your opinion?

A. Well, I wouldn't approach it from that angle. It was a chance to sell products he could not before, because these industrial plants with vending machines, virtually every case had thrown them out so there was no sale whatever of their products.

Q. What I mean to say is this: You pointed that out to the different manufacturers or suppliers when you started into the business and subsequently at different times in talking to them?

[fol. 33] A. We said this to them: "Do you want to sell your products in garages and industrial concerns to men who probably have never used candy?" "Mostly foreigners, to create business for the retail stores in the business, because it does form a habit, I think, a very nice habit, of candy eating." So we found it worked out, and most of them said "yes."

Q. You pointed out the advantages of selling gum through your method of merchandising through machines at that time, did you not?

A. Well, I tried to, but Mr. Wrigley said: "Look, Mr. Leverone, we know more about selling gum through vending machines than any one who has ever lived. My father-in-law who is vice president of the company—

Trial Examiner Bayly: Just a minute. We don't want conversations of somebody else, between other people. You were trying to set up a policy of merchandising and you thought these methods that you employed would increase sales, is that right?

The Witness: Well, we thought it would give them some added sales in places they never sold before, and by doing create gum smokers who in turn would buy gum.

their stores who sold through regular channels, and it proved out.

Trial Examiner Bayly: It proved to be correct. In other words, your policy and methods increased the volume of sales?

The Witness: Through their regular channels.

By Mr. Forkner:

Q. Well now, Mr. Leverone, were there also other factors which, at different times, you point out, like Mr. Ellis, in saving in freight, in commissions, saving in no returns for stale goods, advertising, distribution; were those also factors which were important to the supplier which you pointed out to them when you talked to them, like Mr. Ellis?

A. Very definitely. Some of them, they called to our attention. They said: "You save us a lot of money, in packing for instance. Also, you do a fine job of sampling that we have tried to do at great expense by having girls or men distribute gum in plants, but you do a better job of sampling for us, and that means something to us."

[fol. 34] Q: What I mean to say is this: Those things were discussed and mentioned in connection with getting supplies?

A. In great detail. They would sit down and figure with us. Originally I used to talk to them with our treasurer and they would figure out, say for instance, "if you have these shipped in ordinary plain paper containers, holding a hundred each, you save so much money for us because ordinarily we pack them in packages of 24 that are expensive display boxes used by the dealer." You save that. "We have no salesman call on you whatever, so you save us that."

Q. Well, those things were mentioned, not only because of your high hopes at the time, but I suppose it had the feature in it that you expected them to take into consideration the advantages in selling to you, did you not?

A. Well, we said to them: Look: We are not asking you people for anything special, but will you give us what we save you, because we have an expensive way of doing business and it costs us a lot to do business and we could not do it unless you gave us those savings."

"I don't know that we have ever had anyone say that we

did not make the savings, or was not willing to sit down and figure what it was. They were never the same.

Q. Just tell me what the factors are that you would mention when you talked with these different suppliers. I have mentioned fob, salesmen's commissions. Those are two of them, are they not?

A. Yes. In some cases the freight was one; the salesman calling on you was one. We dealt maybe with the president, and that was the end of it, just once.

Q. He did not have to pay a commission?

A. That is right, and no calls made on us. Also, they don't have to spend one single penny in sampling, where they used to spend thousands and thousands of dollars, in candy, peanut and gum sampling. That was eliminated. The boxing was quite an important thing.

Q. Oh yes.

A. The hundred count instead of the 60, 24; 24 count in sales boxes.

Q. How about the returns?

A. No returns. You see, we don't have any.

Q. How about credit risk?

A. Credit risk, again, they agree the average jobber was a very risky proposition.

[fol. 35] Q. How about the advertising value of selling through the method of distribution?

A. Darned if I know. They may have made an allowance or not. I know the first one wanted to put ads on our canteen but we would not let him.

Q. What I mean to say is this: These things were talked about by you and by your organization in discussing the question?

A. Yes.

Q. Of the price they should make on their product to you?

A. Some were raised by us, some by them. They were generally quite cooperative because they felt this was an entirely new field which did not compete with their old field, and they wanted this business if it did not cost them more.

Q. That was your basis for suggesting to them or asking them to give you what you called a correct or better price or a lower price on trade gum?

A. We did not ask for a better price. We said "Look here is what we are doing now. Will you give us advantage?"

on those?" We don't know what their prices were. I don't know to this day what they sell to on jobbers. We were not interested. Incidentally, we were not very much in a position to say a lot of things.

Q. You were starting then?

A. Yes, and our credit was not such to inspire great confidence. We were honest—

Q. Later on, when you got started and your business began to grow, as it is shown by the history, by leaps and bounds, I suppose then you used a credit risk more?

A. We merely said: "You have none." We discount our bills now, instead of asking for ten extra days.

Q. And no doubt at that time had a larger volume, and I suppose you used that to get a better price, I imagine?

A. Well, I don't know about the volume. The packing in hundred cases, yes.

Q. That—

A. That really means something to them. Those fancy display boxes are expensive.

Q. Take the case of Wrigley Company, and you probably knew the price that you secured from them, at the beginning, which is continued apparently on down, maybe with an exception, is thirty-eight cents per hundred sticks [fol. 36] except recently, that has been changed, thirty-eight cents, less two per cent?

A. It is considerably higher now. I can't tell you. They jumped the price, I am certain.

Q. Recently?

A. Sometime ago. We could get the facts when you talk to the proper party. I don't want to make an inaccuracy.

Q. For a long period of time, the record will so show.

A. Whatever the record shows—

Q. —it was thirty-eight.

A. That was the original price.

Q. Less two per cent ten days, thirty days net. At the same time Wrigley Company sold to jobbers, retailers and other vendors at fifty-five cents, which is seventeen cents higher.

Mr. Howrey: If your Honor please, I object to Mr. Forkner testifying again. There is no evidence in the record to support that question at all. There may be evidence in the

record later, what it is, and he can ask then, but he is testifying here what the jobber price is, and I do not believe you are competent or qualified to act as a witness in that respect.

Mr. Forkner: I believe that on what counsel says, that the Wrigley Company price is in an exhibit, which has been introduced, and it is here; by the way, Mr. Leverone.—

Mr. Howrey: My objection is to your testifying as to what the jobber price is.

The Witness: I don't know what the jobber price is.

By Mr. Forkner:

\* \* \*

Q. Just prior to 1940, probably 1940, when you had that conversation?

A. Well, I am sure that we had conversations with him about selling us his goods, and we probably submitted facts just as he desired, as to certain savings that we could make for him.

Q. Yes, that is what I meant.

A. I would not question that.

Q. That is no different than you have done with other suppliers?

A. Up to the last three or four years. The last three or four years we have gone out in the market and tried to [fol. 37] buy cookies and raisins and any other darn thing, to put in our canteens. It is the reverse now. We lose money on many items.

Q. You are probably now concerned, to get the goods. You don't care about price?

A. Yes.

Q. That was not a condition before the war?

A. No.

Q. When you had—

A. No, before the war you had the reverse. Well, say maybe a year or two before the war when manufacturers were very desirous of selling you and if you could make a savings they were generally glad to pass it on, which seems fair enough.

Q. Well, you did not hold back in pointing out the savings to be made in selling you?

A. No, we would be stupid if we didn't. I think they knew that.

Q. You still told them about it?

A. Well, I couldn't tell you specifically. I had nothing more to do with it after say, about 1932, 1933. Many of these people, I greeted them, but had nothing to do with their dealings.

Q. I am going to read to you, Mr. Leverone, from Commission's Exhibit 5, article four, in which it is stated:

"4. The distributor guarantees that for each calendar month throughout the period of this agreement, the distributor's average sales volume as hereinafter defined by means of each of the following types of canteens, which have been heretofore delivered to the distributors hereunder"—and the names appear—"shall equal not less than 80 percent of the national average sales volume as herein-after defined during the same calendar month by means of the same type of canteen."

A moment ago I asked you about that and you said you knew nothing about it; did you understand the question at that time?

A. Yes. It is very vague to me. I don't believe there is any attempt to enforce it.

Q. I did not ask you about enforcement.

Trial Examiner Bayly: Do I understand the question goes to whether or not you had quoted a standard quota, that you are asking the men to live up to, is that right?

The Witness: Well, if it is in our contract, we apparently had it, and I would say the reason was to set a goal for them, [fol. 38] so we could set that down and send a man if necessary who would say: "Look, you have fallen below the quota. We are going to help you." Anything a man fell below, we sent our men in, because we felt that our success depended entirely on his, and we used to say: "We will have to kick a man to success; otherwise we will lose money."

By Mr. Forkner:

Q. And if he did not come up to that average you had the right to kick him out or dissolve the contract?

A. We did not.

Q. You had the right?

A. Yes.

Q. You had the right?

A. We found in 1933 that we could cancel out every canteen we had at the time but we didn't.

Q. Now, I think, Mr. Leverone, we got a little diverted on the services rendered to the distributors: I want to know a little more about this engineering department: Is that a separate division of the company that helps and aids the local distributor?

A. Yes, that does in this sense: The engineering department supervises all repairs. They teach the distributors how to repair their own canteens up to a certain point; beyond that of course they can't, and they are shipped on here and repairs are made under the supervision of the engineering department, but the real function of the engineering department, outside of training those men, is to develop ideas if they can, or if not, to try to develop canteens along other ideas that may be submitted to them by me or

Q. How important is that division or how important has that division been to you in the past in connection with the development of your business?

A. It has been extremely important during the last five or six years, developing these new types of canteens to be used when we can get products to sell.

Q. Well, is there big changes made in designs on vending machines and is there considerable changes at all times?

A. Well, during the first ten or fifteen years in the business, a few radical changes were made. Now we are in that same stage again, due to the present costs. We are trying [fol. 39] to design and to have designed canteens with much larger capacity. You see, to cut down the sales costs, the service cost I mean; we have designed other types of canteens that are very radical departures from those we had in the past; again, in order to make a profit.

Q. Well, is that of any aid to the distributor in competing for locations against other independent vending machines operators?

A. Well, I think the only aid we have is our statement that whatever we say is true, that we give them their service, when we give them certain grade of candy, because we do not compete on commissions. Unquestionably we pay the smallest commissions as far as I know of any.

Trial Examiner Bayly: The question is: Would this help the proposed distributors in a larger machine that would take fewer refills?

The Witness: It would help him make a little larger margin of profit, by cutting down the number of times he services them. It offsets in some respect the higher cost of candy.

Q. Were they compelled to accept the services of your accounting department?

A. No, they just begged for them.

Q. Begged?

A. That is right. All our service. They are part of them. They want them. If you want service of the other departments, I take it that is your question.

Q. Well now, I think you missed one big department, quite necessary in helping the distributors compete for business: I would name it to be the traffic or the product division, perhaps?

A. We have no traffic department. We had a man, a traffic man. Our traffic is more assigning in these days of limited products, assigning the proper amount to people, so they can stay in business, and he is part of the products department.

Q. I am referring more to the pre-war period.

A. He still had that position. He is part of the product department, and we never called it any separate division.

Q. What are the duties and the functions of the product division, as it affects the local distributor and helps him in carrying on his business more efficiently and with greater margin of profit; don't they buy the candy and the supplies, peanuts and gum?

[fol. 40] A. They buy the candy; the product department buys the candy.

Q. Nuts or peanuts?

A. That is right, buys all the supplies, and in normal times, they see that they are shipped; the orders clear through them. They say they—they see that they are shipped in accordance with the order.

Trial Examiner Bayly: Do I understand that this entire quantity is bought and then reconsigned to distributors?

The Witness: Up to the time that the war cut off the suppliers.

Trial Examiner Bayly: Yes.

The Witness: The product department would test the bars first, don't you see, and then if they were proper, they decide to purchase them and then the distributor is given a list of all the bars that are available and he buys whatever he wants out of them. He has a supply, I would say of 80 or 90 bars to choose from and probably doesn't sell more than fifteen at a time of that kind. He picks them out.

By Mr. Forkner:

Q. Well, the profit that the company gets, the Automatic Canteen Company gets, come from this resale of the candy, is that right?

A. Yes.

Q. Is there any dependence placed upon the rental of the machines?

A. Well, the idea of the rental machine was to see, was so as to own them always; they couldn't be sold, and then some one individual capitalize on the name of the Canteen, and sell to inferior products, but the idea was a no profit one; it was a rental, and actually it did not cover the obsolescence and deterioration and repairs and parts furnished. So our profit comes from the sale of candy.

Q. Now, I think you have stated that, or it is in the record, that during the war and at the present time perhaps, many of these distributors have had that portion of their contract waived which provides that they have to buy all supplies through the Automatic Canteen Company?

A. Yes.

Q. But at the same time, that is temporary, is it?

A. Oh, yes, because we would be—

[fol. 41] Q. At the same time, it is also provided that they

are supposed to pay you twenty-five cents for each hundred bars?

A. No, sir, they don't pay us a penny. That was cancelled out. Originally we thought they should pay us. Then they had agreed to it. But they found themselves paying extremely high prices, and we said: "We are willing to take the loss" and we have waived it completely. They don't pay us a penny.

NATHANIEL LEVERONE resumed the stand and testified further as follows:

Cross-examination.

By Mr. Howrey:

"Q. Mr. Leverone, did any of the suppliers of Automatic Canteen Company inform you that such price differential as you may have received was in excess of any differentials which differences and costs would justify as compared with his other customers?"

The Witness: The answer is positively no.

By Mr. Howrey:

Q. Mr. Leverone, did you have knowledge from any other source that such price differential as you may have received was in excess of such cost differences?

A. None whatever.

(The reporter read the question as follows:

"Q. Mr. Leverone, in your testimony this morning under direct examination when you spoke of having discussions with certain of your suppliers with reference to differences in costs in serving Automatic Canteen Company, did you have reference to a discussion of actual cost figures or principles?"

Trial Examiner Bayly: I think he should answer that question. Objection overruled.

Will you read the question again to the witness?

(The reporter again read the question.)

The Witness: I never discussed the actual costs. I only discussed principles.

\* \* \* \* \*

[fol. 42] Redirect examination.

By Mr. Forkner:

Q. Mr. Leverone, you have stated on your cross examination that you had certain beliefs—I guess that was ruled out—but you had certain knowledge from certain sources that the price differential or the price that you received was not in excess of the differences in cost of manufacture and delivery, is that correct?

Mr. Howrey: Your Honor, I ask that the reporter please read that question back?

Trial Examiner Bayly: Will you read the question, please?

(The reporter read the question as follows:

"Q. Mr. Leverone, you have stated on your cross examination that you had certain beliefs—I guess that was ruled out—but you had certain knowledge from certain sources that the price differential or the price that you received was not in excess of the differences in cost of manufacture and delivery, is that correct?"

Mr. Howrey: If your Honor please, I object to that question because that was not Mr. Leverone's testimony. He testified that no supplier informed that any such price differential as Automatic Canteen Company may have received was in excess of any differential, which is in differences in cost was justified as compared to his other customers. Then in response to another question of mine he testified that he had no knowledge from any other source that such price differential as he may have received was in excess of such cost differences. That was his testimony, and the question was that he had suggested that he had

knowledge that they were not in excess. His testimony merely was that he was not informed that they were and he had no knowledge that they were.

Mr. Forkner: Counsel's objection is more a play on words than it is the necessities of an equal objection.

Trial Examiner Bayly: You may answer; the objection is overruled.

Will you read the question to the witness again?

(The reporter again read the question.)

Trial Examiner Bayly: Does that fairly state your testimony?

The Witness: I have no knowledge whatever that we were ever given any price differential over and above the actual cost that we saved the manufacturer along the lines I spoke of this morning, the packing, salesmanship, and so forth.

[fol. 43] By Mr. Forkner:

Q. You had no knowledge?

A. Never had any knowledge or heard that we ever received anything in excess.

By Mr. Forkner:

Q. What was the basis of your information on which you made your answers to your counsel's questions, Mr. Leverone?

A. Well, in the early days, as I testified this morning, I merely talked to some of these manufacturers and I set up these principles with them. They added others where we made certain definite savings for them, and I never knew there was any other change made and I still have no knowledge.

Q. Then you knew, Mr. Leverone, that you were getting a price which was lower than others who were buying the same products?

A. No, I have no knowledge of that.

Q. If you brought their attention to the different savings they could make you were doing that for what purpose, Mr. Leverone?

A. If we felt any savings, that was?

Q. What purpose were you doing it for?

A. So we could get a lower price.

Q. So you could get a lower price?

A. But only on a definite saving they had.

Q. Did you tell them what that definite saving would be?

A. No, never.

\* \* \* \* \*

By Mr. Forkner:

Q. Mr. Leverone, you say you talked to only three or four suppliers?

A. No.

Q. You are positive of that?

A. Yes, very positive.

Q. Name those three or four suppliers?

A. Curtiss Candy Company.

Q. All right.

A. Wait a minute. I talked to three or four, but I didn't meet all the officials, but I talked to them about this specific matter of prices. Is that the question you are putting to me?

[fol. 44]. Q. Yes, that is one.

A. Curtiss Candy Company; the William Wrigley, Jr. Company, Hershey Chocolate Corporation.

Q. Hershey.

A. And Williamson Candy Company.

Q. Williamson.

A. I am positive I never made any mention of anything to do with any other concern.

Q. Are those the only companies that you have ever talked to about price?

A. I didn't talk to them about price. I talked to them about savings. I didn't talk to any company specifically about price.

Q. Savings as it affects price, I suppose?

A. Savings.

Q. And particularly price to—

Mr. Howrey: Let him finish his answer.

Trial Examiner Bayly: Let him answer.

Will you read the question?

(The reporter read the record as follows:

"Q. Savings as it affects price, I suppose?"

"A. Savings—")

The Witness: I think that would be correct.

By Mr. Forkner:

Q: In your discussion with the Curtiss Candy Company who did you talk to?

A: Otto Schnering and Karl Kiefer.

Q: And were you not informed by them or did you know the prices at which they sold candy?

A: I didn't have any idea what their prices were.

Q: Did you ever see any of their price lists at that time?

A: I have never seen their price list. You understand I have never handled the purchase of candy.

Q: Now, who did you talk to at the Williamson Candy Company?

A: George Williamson, the president.

Q: Did you mention the savings to him that you would make for them?

A: I am sure I did to George Williamson. At some later date I went out to lunch with him and the candy buyer, and I happened to know Mr. Williamson and I told him about [fol. 45] these firms and their deals with us, and that they found they got a distribution among people who did not buy candy and there were certain savings.

Q: Where was that, at your office?

A: I don't think so. I think that was in the dining room. I was just trying to recall it.

Q: Isn't it a fact that you had lunch with him in the dining room and you were there with him at that time until five o'clock that evening?

A: No, he wasn't with me. He may have been with the candy purchasing department.

Q: Didn't you tell him about the savings then that he would make?

A: I told him at lunch time.

Q: Did you further tell him that he should bear that in mind in making a price to you?

A: That I couldn't tell you. I negotiated no deals, you understand that.

Read the question.

(The reporter read the question as follows:

"Q. Mr. Leverone, was one of your purposes in stating the different savings you could make and the advantages which the supplier would gain to secure a better price or a lower price than that which others obtained for the same size or for the same bar unit?"

Trial Examiner Bayly: Now, that is a specific question. Can you answer it yes or no? If you can, do so; if you can't, say why you can't.

The Witness: Well, I would say it was partially true, and when I say partially, I mean at the time candy manufacturers had the so-called candy deals, if you went to a candy manufacturer to buy Baby Ruth bars, they would say, "We will sell you so many Baby Ruth's and we will give you this free amount of an unknown bar or we will give you some baseball gloves," and so forth and so on. That is the sort of thing it is. We don't come in on that. We said we wanted to eliminate those things. We don't want prizes and baseball bats. We wanted just the bars that sell, the Baby Ruth's, and we didn't want the free offers in the general candy industry. Some of them gave you a lot of penny lollipops to sell to the children. That is an excellent store sale, but for us we just want the right price and forget those things, because those would be savings to them.

[fol. 46], By Mr. Forkner:

Q. Why did you mention that to them for?

A. Because we didn't want to buy that, and why should we pay for it. We didn't want it.

By Mr. Forkner:

Q. When you mentioned deals Mr. Leverone, that you did not care to receive, did you do that for the purpose of

securing the reduction from the supplier for that reason?

A. Well, we are not receiving a reduction. We merely weren't paying for these so-called free deals where you would have to sell that pe-tiny goods or baseball gloves or diamond rings or watches or whatever they had. That was the way they did business then. That is a retailer's system of doing business.

Q. In other words, you were getting a price less than what was charged to others?

A. No; they were giving these other things which they claimed were being given them free, but actually they were paid for by them. Actually, if you figured out the retail price or the wholesale price of these others, you would find that it would be over what we paid.

Q. In other words, though the price was a different price as far as the monetary amount and the price per bar?

A. But they received more goods. May you explain if I bought 100 boxes of Baby Ruth they gave you 20 extra boxes of butter fingers.

Q. We will take some other example. You talked about deals. How about freight and commissions and on returns for stale candy? Are those some of the factors that you mentioned in discussions with these different individuals?

A. No. I raised the point of freight. I never raised the point of returned goods.

Q. How about commissions?

A. About credit.

Q. How about commissions?

A. I don't think I ever raised that as any great saying, but I know I have said it. I said to them, "You never need to send a salesman to call on us if you decide to let us use your bar, as the public will always be used to it [fol. 47] and the public will buy it, and there will never be any need to send out a salesman."

Q. Just what was the purpose in telling them all about this? Was it merely to get them to sell you candy, or was it to get them to sell candy at a lower price?

A. It was first raised to get them to sell us candy, because of their negative experience with people in the vending machine field. Nobody had been successful, and they lost money on them and they wouldn't sell you.

Q. Would you say that you did not have in mind securing an advantage in price by reason of these things that you brought to their attention?

A. No, I wouldn't say very positively that we felt that instead of buying in their fancy packages which cost them a lot of money, if they could ship up in the plain boxes we would be entitled to the saving.

Q. How about the companies that already made the plain packages, the 100-count?

A. We never—

Mr. Howrey: I object unless he mentions the name.

By Mr. Forkner:

Q. The Curtiss Candy Company?

A. They didn't do it.

Q. They made 200-count packages?

A. Not that I heard of. We made the boxes ourselves and supplied them to them. We had the boxes made for us and supplied them to these candy companies in many instances. They said that we could have the saving; that is what we did.

In other words, they billed us for the bars only. We were very big box buyers for several years, and, also, may I add, again, that the saving was where a distributor would return the boxes and we would send the boxes back to the candy manufacturers, and they would fill our own boxes over again.

Mr. Forkner: I would like to call at this time Mr. M. J. Holloway, adversely, of the H. J. Holloway Company, manufacturers of candy, to the stand.

Mr. Howrey: If Your Honor please, may I make an inquiry?

Trial Examiner Bayly: Yes.

Mr. Howrey: I understood what counsel meant when he said "adversely" with reference to the officials of the [fol. 48] Respondent's company, but I don't know what he means when he says he calls other people adversely, and I do not think he should be allowed the same latitude in his

direct examination of the other witnesses as he was with the officials of the Respondent.

Mr. Forkner: The rule on adverse parties is not confined to the defendant or to the adverse party in the pleadings, and it is not confined to the party in this law suit; it can be extended to others where they have a vital connection. We have here a supplier and we have a buyer; under the law, both are liable and both can be held, one under 2-A and one under 2-F—the same transaction.

Trail Examiner Bayly: All right, let's get the witness and get started.

M. J. Holloway was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Forkner:

Q. Would you give your full name and address?

A. Milton J. Holloway, 2302 Asbury Avenue, Evanston.

Q. And are you connected with the Holloway Candy Company?

A. I am the President.

Q. How long have you been in the candy business?

A. Twenty-five years.

Q. What kind of candy bars or other candy have you made during the period of 1936 to 1946 inclusive? Give me the names.

A. I made a piece called "West Wind," that was discontinued for several years, after that, and a bar called "A-Z", and there are several other bars that I can't recall the names of which we have made just for the Automatic Canteen Company. I think one was called "Yum Yum," and I think a pecan fudge. That is as much as I can remember.

[fol. 49] Cross-examination.

By Mr. Howrey:

Q. Mr. Holloway, I would like to ask you this question: Did you ever inform anyone connected with Automatic Canteen Company that your price differential to Canteen was in excess of any differentiation which your differences in cost of manufacture, sale, or delivery would justify, as compared with your other customers?

A. No, sir.

Mr. Forkner: I will be very careful hereafter. Mr. Holloway, is there anything which explains the difference in price here granted to the Automatic Canteen Company and to other customers other than the item of freight?

The Witness: Commissions and carriage.

Mr. E. W. Cline was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Would you give us your full name and address?

A. E. W. Cline, 5756 Bernice Avenue, Chicago.

Q. And what business are you engaged in?

A. Manufacturing confectionery.

Q. And how long have you been in the business?

A. Thirty-four years.

Q. How long has your company been in business?

A. Seventy-six years.

Q. What is the position that you occupy in it?

A. Vice President and Sales Manager.

Q. State whether or not in any of those conversations Mr. Anderson or Mr. Boyd brought to your attention cer-

tain-named advantages which they suggested, or savings, for the purpose of securing lower or a better price. Did they state them to you, that is all.

A. Well, we discussed the saving in the pack, and the freight, and naturally they are savings.

[fol. 50] "Q. Can you remember in substance any of the things that were told you by either of these two officials of the Automatic Canteen Company, as to why they should have a lower or a better price, which you were to take into consideration in making your price?"

A. They may have mentioned those things. However, we figured the prices ourselves and quoted the Canteen Company a price. That is how we arrived at our price.

Q. I understand that, Mr. Cline. In other words, when you made the price you did some figuring.

A. Naturally.

Q. All right. Now I am not asking about that. I am asking about what was mentioned to you by them before you did your figuring. In other words, what were some of the factors, or the substance of the conversations that they might have had with you at that time in talking about the matter?

A. It would be pretty hard for me to remember way back when I first talked to Anderson.

Q. Take up Mr. Boyd, then.

A. When Mr. Boyd was with the Canteen Company in handling that end of the business, of course we ourselves quoted him our prices, and we did our own figuring, taking into consideration the natural savings compared with selling to 24-count customers, and the display matters and all that.

Q. That is what you did?

A. That is what we did, yes.

Q. In conversation with Mr. Boyd, were any of these things mentioned as to why they should have—did they talk about better distribution or advertising value or any of those factors?

A. Not in particular, as I remember. However, it was a very good outlet for distribution.

Q. Who said that?

A. I say that.

Q. Did they mention that to you?

A. They may have. I don't remember whether they did or not.

[fol: 51] Cross-examination.

By Mr. Howrey:

Q. Mr. Cline, did you ever inform anyone connected with Automatic Canteen Company that your price differential to Canteen was in excess of any differential which your differences in cost of manufacture, sale, or delivery would justify as compared with your other customers?

A. No.

PAUL R. TRENT was therupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Your name is Paul R. Trent?

A. Yes, sir.

Q. And you were formerly Vice President and Sales Manager of the Schutter Candy Company?

A. Yes.

Q. When did you become a Vice President and Sales Manager of this company?

A. I became the Sales Manager in 1938. I can't answer the exact date as to when I became Vice President.

Q. And up until what time did you remain in that position?

A. November, 1944.

Q. What is your present work and your present position?

A. I am in the chewing gum business. I am sales manager of a chewing gum company.

Q. Do you recall about what pack and price there was to the Automatic Canteen Company, in general?

A. I think the only count that for years we sold to Automatic Canteen was 100-count. Do you mean through the whole period?

By Mr. Forkner:

Q. What was said at some of these conversations?

A. I don't believe that that is physically—or mentally—possible for me to answer, and quote direct conversation. [fol. 52] Trial Examiner Bayly: You don't need to, Mr. Trent. Just give the gist of the conversation. In substance, what was said about prices or anything of the kind, concessions?

A. Well, the value of distribution has been pointed out to me by Mr. Boyd, and the fact that we used the 100-count merchandise instead of 12-count amounts for them.

Q. Then the elimination of freight, or elimination of salesmen's commissions—was that in any of the conversations?

A. Freight may have been discussed, but not in that connection, because freight would have no bearing. We would know our freight costs and freight would have no bearing at all on any price that we might ultimately quote anyone in that sort of a position.

Q. What other conversation did you have? What other matters did you discuss?

A. Of course, it is quite obvious that if I contacted the account it was a house account, and that subject had been spoken of, I don't know in what manner or in what way; I can't recall that.

The Witness: The factors that we discussed were volume, distribution, lack of sales costs, or the elimination of sales costs, and 100-count packaging.

Cross-examination.

By Mr. Howrey:

Q. Mr. Trent, did you ever inform anyone connected with Automatic Canteen Company that your price differential to Canteen was in excess of any differential which your differences in cost and manufacture, sale or delivery would justify, as compared with your other customers?

Mr. Forkner: Just a moment. I object to the question on the grounds that have already been gone over. I think it is about time that that 64 dollar question was left out of the picture. May I ask a further qualifying question of the witness? Do you understand the question?

The Witness: I was going to ask to read it if I might.

Mr. Howrey: I am not asking you whether there were any cost differences; I am not asking you to give those [fol. 53] cost differences. I am merely asking you whether you ever told anyone connected with the Automatic Canteen that your price differential to Canteen was in excess of any differential which your differences in cost of manufacture, sale, or delivery would justify, as compared with your other customers.

Mr. Folkner: Just a moment. I might mention further that what counsel is attempting to do is shift the burden. There is no law that there is any burden on any manufacturer to make such a statement, and the law is not that way.

Mr. Howrey: We are merely asking what he may have said to—

Trial Examiner Bayly: Now, Mr. Folkner, do you want to ask this witness if he understands the import of that question? Is that what I understand you want to ask him before he answers?

Mr. Forkner: I just wanted to see if he really understood it.

The Witness: If I interpret it correctly, the question in my own language simply means, did I ever tell a buyer or someone at Canteen that we were giving them a lower price based on the same elements as anyone else in the world.

Mr. Howrey: A lower price than you could justify by your savings and costs.

Mr. Forkner: Now we understand that the witness doesn't understand the question. That is why I say the question is impossible.

Mr. Howrey: May I show it to him?

Mr. Forkner: No.

Mr. Howrey: Would you like to read it? (Hands it to the witness.)

The Witness: When you say here, "was in excess of any differential which your differences in cost of manufacture, sale or delivery," you are referring to the difference in the cost of manufacture, sale or delivery to Automatic Canteen, as compared with other prices. I understand the question; I think I do.

Mr. Howrey: Did you ever tell anyone in Automatic Canteen that such was the case?

The Witness: Am I to answer the question?

Trial Examiner Bayly: Did anyone ever ask you such a question as this in this form?

The Witness: No, sir.

[fol. 54] Trial Examiner Bayly: Well, then, of course you had no occasion to tell them, did you?

The Witness: No, sir.

Trial Examiner Bayly: You may answer the question.

The Witness: The answer to that is "No."

#### Proceedings

Trial Examiner Bayly: Ready, gentlemen?

Mr. Forkner: I would like to call Mr. B. E. Heath of S. L. Heath and Sons of Robinson, Illinois.

BAYARD E. HEATH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Would you give your name and address, please, Mr. Heath?

A. Bayard E. Heath, Robinson, Illinois, Post Office Box 251.

Q. And were you subpoenaed to appear at a later time at Indianapolis at a hearing in this case?

A. I was.

Q. And are you appearing at this time in lieu of that appearance?

A. Yes.

Q. Were you attending a convention here and happened to be in the city, that is the reason for your being here?

A. Yes.

Q. And how long have you been in the candy business?

A. Since 1914.

Q. And are you associated with your father, Lawrence C. Heath, with L. S. Heath and Sons of Robinson, Illinois?

A. The firm consists of my father, myself, and three other brothers, five members.

Q. Five?

A. Yes.

[fol. 55] "Q. Now, can you give us the price that these competing manufacturers that you have named in the record here sold their bars at during the same periods of time according to your best recollection?"

Trial Examiner Bayly: The objection is overruled. The witness may answer the question.

The Witness: The only answer I can give to that question is that the established price on recognized items in the manufacturer's market, was sixty-four cents.

By Mr. Forkner:

Q. For what count?

A. Twenty-four count. That was the recognized price on 24 count; as to what other manufacturers sold their bars I would have no way of knowing unless I had seen every invoice and received a bill. Unfortunately there was a lot of price cutting at that period.

Q. What do you mean by the established price? If I may ask you more particularly?

A. A recognized practice in the industry, a recognized price, of sixty-four cents per box of twenty-four count, had been established by selling bars as a list price. There was no establishment of the price through any method other than competition, but that would more or less establish a uniform price.

Q. Was that sort of a custom in the industry?

A. I would not say it was a custom, but when you are manufacturing an item that retails at a certain price, you have to make a spread from the manufacturer to the retailer for the various individuals that are involved in handling that to the trade, and at that particular point, sixty-four cents was recognized as the logical price to be charged for standard five cent items.

• • • • •  
Q. You mean you never changed your price on any sale that you ever made, from your established price?

A. I never changed my price. I have at times, in certain areas, offered the distributor a rebate to his salesman, for placements of new accounts, but my price remained sixty-four cents; that was for promotional work on the part of the salesmen and in an effort to place it with new accounts in the area.

[fol. 56]. Q. What was one of the elements that Mr. Boid suggested to you which would be a savings or which would merit his receiving a lower price which was discussed between you? Just answer what the item was first.

A. Well, you just want one item!

Q. Well, if there is more than one, go ahead.

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A. The commission angle was discussed, but I wouldn't say that he suggested that all commission be eliminated. The recognized commission to a representative is five per cent, and if I recall correctly, it was suggested that some of that could be eliminated.

Q. And what was your answer at that time, to that point?

A. I told Mr. Boid that we would never at any time refuse to allow the salesman in the territory the commissions due them.

Q. What did Mr. Boid say to that, your refusal?

A. I don't recall.

Q. Were there any other items discussed which you may or may not recall?

A. I think it was suggested that the advertising value of the bar in the machine of the Automatic Canteen Company would be of some value to the manufacturer.

Q. Mr. Heath, do you have the impression, the definite impression, that Mr. Boid was trying to get a lower price than was merited by any differences?

A. I don't know whether I had the impression he was trying to get--the impression I received from my meeting with him was that our price was too high for them to use. That would be the only impression I could have, because we received no orders from him.

By Mr. Forkner:

Q. Was price the principal topic of discussion during your conversation with Mr. Boid, particularly the last one?

A. Not entirely, although price was a major consideration.

Q. It was?

A. Mr. Boid definitely left the impression with me that he would like very much to place the Heath bar in the Automatic Canteen. If I recall, after I submitted my quotation to him, I suggested that he place it at my price, in a [fol. 57] certain number of machines in certain areas and give it a trial. I felt sure that he would realize as fine a margin of profit as any item in the machines if he would give it that try.

Q. What did he say to that?

A. He did not say whether he would or would not, but he did not place an order with me.

• • • • •  
Redirect examination.

By Mr. Forkner:

Q. Counsel asked you if it was a fact, that the fact of the bar fitting into the vending machine was not the principal reason for their not taking your bar, and I believe you stated on cross examination by counsel that that was not in your opinion the principal reason; Will you state what was the principal reason, in your opinion?

• • • • •  
A. I was given a definite impression that the Heath bar was wanted in the Automatic Canteen Company's machines. The only conclusion I could draw as to why it was not in that was my price, that my price was not satisfactory to them. That is the only conclusion I could draw from it.

Trial Examiner Bayly: Show the hearing resumed Friday, June 28, at 10:00 a.m.

Mr. Forkner: Miss Reporter, note that I am calling Mr. Fred Foster of the Sperry Candy Company of Milwaukee, adversely.

FRED F. FOSTER was therupon called as an adverse witness for the Commission and, having been first duly sworn testified as follows:

• • • • •  
Direct examination:

By Mr. Forkner:

Q. Will you give your full name and address, Mr. Foster?  
A. Fred F. Foster  
Q. You are the president of the Sperry Candy Company?  
[fol. 58] A. Yes.

Q. How long have you been the president of that company?

A. About 24 years.

Q. Are you also in any other business other than manufacturing candy?

A. Yes.

Q. What business is that?

A. Wholesaling candy.

Q. Wholesale candy?

A. Wholesaling.

Q. Mr. Foster, did you have any deals during that time or free goods in 1938 to 1941, inclusive?

A. I believe we did.

Q. Will you state for the record why you had those deals or those free goods?

A. Usually to introduce a new number.

Q. At what price did you sell to the Automatic Canteen Company during the same period?

A. \$2.10 per 100.

Q. What period of time are you referring to, Mr. Forkner?

A. 1939 to 1940, 1941 and 1942, early part of 1942.

Q. Did you have any negotiations with the officials of the Automatic Canteen Company in connection with fixing that price or prices shown on Exhibit 14, Commission's Exhibit 14?

A. Not personally. It was handled through our Chicago Agency.

Q. You had several conversations, one with Mr. Boyd and one with Mr. Anderson, did you not?

A. That was a few years prior to our selling them.

Q. Did you call on the Automatic Canteen Company and talk to Mr. Boyd at one time and another time Mr. Anderson?

A. Well, the first call I made was a few years prior to our selling them that I called on Mr. Anderson, but did not attempt to sell him anything.

Q. Just a moment. That was Mr. Anderson?

A. Mr. Anderson.

Q. What was the substance of that conversation at that time?

[fol. 59] Mr. Howrey: If your Honor please, I object to that as being too remote. The witness has testified that it was several years prior to any sale to Automatic Canteen Company and that he did not at that time try to sell them anything.

Trial Examiner Bayly: The testimony is the purpose for which he went to see this party, not quoting what this other person said, however, but what he did following that conversation. What you are after here, as I understand it, is why ~~the~~ difference in price of the sales to other people and that of the same goods to Automatic Canteen; is that right?

Mr. Forkner: I do not believe that is quite correct.

Trial Examiner Bayly: You go ahead anyhow.

Mr. Forkner: Because I am not trying to find the reasons. I am trying to find out what were the things that were said in relation to those matters.

Trial Examiner Bayly: Is there a question before this witness?

(The reporter read the question as follows:

"Q. What was the substance of that conversation at that time?"

Trial Examiner Bayly: I am going to let him answer that; in substance, what did you say, what was the result of it?

The Witness: I went there at the request of Mr. Arthur Meyerhoff, who is the head of the advertising firm that we employed and was the friend of those people.

He wanted me to go over there and get acquainted with them, and I went. We were more or less, you might say, visiting.

By Mr. Forkner:

Q. What was the substance of your conversation, as you recall it, according to your best memory?

A. Mr. Meyerhoff being a friend of theirs, they did all the talking. They were more or less visiting.

Q. Now, you made a second visit.

A. To see Mr. Boyd at the request of the business agent of the union whom we had made a settlement with in Milwaukee, and who wanted us to sell them for—sell their Milwaukee operations so that they could have our goods [fol. 60] available for their members in one of the large factories, I believe Allis-Chalmers.

Q. Did they indicate what price they wanted to buy your candy at?

A. No.

Q. Did they indicate that at any time?

A. Well, that was handled by Mr. Granberg, our agent, but I do not recall it. We were requested to submit our price, which we did, and they accepted it.

(The reporter read the question as follows:

"Q. What items were mentioned by either Mr. Anderson or Mr. Boyd that you should consider in taking up the matter of selling to the Automatic Canteen Company in the way of savings or advantages that you would gain by giving them a better price?"

A. As I recall the conversation with Mr. Anderson, we were discussing their method of operating, and they bought f.o.b. factory. They paid the freight, and there may have been some other items.

By Mr. Forkner:

Q. How about no returns for spoilage?

A. Yes, there is no return, which at that time was a very serious matter.

Q. They mentioned those to you at that time?

A. Yes. Well, possibly so.

(The reporter read the question as follows:

"Q. What items were mentioned by either Mr. Anderson or Mr. Boyd that you should consider in taking up the

matter of selling to the Automatic Canteen Company in the way of savings or advantages that you would gain by giving them a better price?"")

Trial Examiner Bayly: Now, if you can answer that in substance, generally:

A. The discussion was pretty much between Mr. Anderson and Mr. Meyerhoff as an advertising agent, and I presume he was trying to explain to him the basis on which they operate.

By Mr. Forkner:

Q. Who was trying to explain to whom?

A. Mr. Anderson.

[fol. 61] Q. What did he say in substance?

A. To me they were kind of visiting back and forth and talking over—

Q. What did he say in substance?

A. Well, that was a pretty long time ago. They, I believe, mentioned there is the saving of freight, and of course their operators are not called on by salesmen, and it would be assumed there would not be a commission.

Q. F.o.b. factory?

A. That is right.

Q. That is three items?

A. That is right.

Q. Did Mr. Anderson or Mr. Boyd in either of these two conversations talk about the different items of savings that would be made in selling your candy to them other than the three that you have mentioned?

A. I do not believe that I ever discussed the matter after that with Mr. Anderson, and I do not recall Mr. Boyd ever discussing the matter of price and savings in connection with selling them. That was handled through our agent in Chicago.

Q. Now, Mr. Foster, did you fail to go near the Automatic Canteen Company or its officials for a long time because you would not sell to them at the prices that they wanted?

A. No, I did not know what price they would want. We did not go near them for the reason that we did not contact

syndicates and things due to the labor difficulties, strikes and our not being able to handle the business we already had.

[fol. 62] FRANK J. KIMBELL, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination,

By Mr. Forkner:

Q. Your name is Frank J. Kimbell?

A. Yes, sir.

Q. And you operate the Kimbell Candy Company located at 3546 Belmont Avenue, Chicago, Illinois?

A. Yes.

Q. And are you the president of the Kimbell Candy Company?

A. Yes, sir.

Q. How long have you been in the candy business?

A. Well, I have been in the candy business since 1905.

Q. 1905.

A. Yes, sir.

Q. Yes. Now, from your experience as president of the company and with your contacts with these various sellers—

A. Yes.

Q. (Continuing)—have you had the experience of having to make a bid for a sale of candy to a large buyer, such as a chain or syndicate or vending machine operator where you had to make in order to get the order some concession?

A. It is a good deal like our bulk goods. We have been supplying bulk goods to syndicates like Woolworth and those accounts where their business runs into a fairly good share of our volume, and I handled those accounts myself. I mean those contacts. There was very little sales cost

connected with it, and we did make a price accordingly, but we did get our regular working profit.

Q. Yes. What I mean to say is how much of a difference there in that case would it take to divert, get or lose a sale?

A. Well,

Q. According to your experience?

A: There were times when on certain items that we had to make concessions, sometimes fifteen per cent or more in order to get that business.

[fol. 63] Q. I would like the same question answered in respect to the 24-count bar.

A. Well, the 24-count bar—you see, that was largely sold to the jobber. We did have a few cases where we supplied some of the chain grocers, and the difference there was about two and a half per cent—no, two and a half cents, not per cent; 57½ cents on that.

But here was the point. Now, that would constitute an order sometimes of a thousand or more boxes, and that delivery would be made to one warehouse, and our cost of sale there was very much reduced over selling a case or a hundred boxes or what have you to Mr. Jobber and furnish him the samples and then take the credit risk which was involved. Also, if Mr. Jobber didn't sell that he considered it the manufacturer's product and he would send it back to him. That was the practice.

Mr. Forkner: All right.

By Mr. Forkner:

Q. Mr. Anderson was the first one that you talked to, wasn't he?

A. That is right.

Q. And Mr. Anderson was then handling the buying of the products?

A. That is right.

Q. I suppose you talked to Mr. Anderson the first time in the offices of the Automatic Canteen Company?

A. That is correct. Yes, I talked there and solicited some business.

Q. What kind of an answer did Mr. Anderson give you at that time, if you recall?

A. I tell you, he put it up to me this way: He said we are not interested in buying any off-weight bars. We want quality. We want the same size bar that you are furnishing the other fellow.

Q. The jobber, I suppose?

A. Yes, the same type merchandise. He did not tell me how much he was going to offer or anything like that. There was no ease of saying he would take a thousand bars or any number. He just said that they would try it out in some outlets and if the product has acceptance, we will use it. And that is the experience we have had.

[Vol. 64] Q. Did he mention about that he bought only in 100-count? I do not think you made the 100-count before that.

A. The point came up. That is, the way it was to be packed, and that they wanted to handle it that way on account of their method of distribution. We were very glad to work with them, because, as I said before, it gave us an outlet which we didn't have in volume. It was only a small volume at the beginning but it grew.

Q. Did he mention any savings or reasons why you could afford to sell cheaper than your usual price per bar at that time? Was there any conversation about that?

A. He put it up this way, that was the pack they were interested in and wanted us to figure on that basis, and, of course, it developed that it worked out at a very much lower cost to furnish it.

Q. What factors were mentioned in that conversation, for instance, was freight and elimination of salesmen's commissions mentioned?

A. Freight was a factor.

Q. I mean, was it mentioned by him?

A. I don't recall that, but when we quoted them they told us what basis they wanted us to figure on. You know, they wanted the 100-count and it was delivered to their Chicago warehouse. In fact, I did my own figuring at that time; and I knew what I could do by the way of cost of packaging it, the difference in the cost, and also the elimination of freight and the fact that instead of delivering a few cartons to a certain railway depot or something like that, we could deliver to their warehouse in a liberal amount.

Q. Those things were discussed between you?

A. As a matter of fact, the point was that they told us they could use hundreds, and it would be delivered to their warehouse. The quantity was not discussed as to how much, but I had to talk with some other manufacturer as to possibilities.

[fol. 65] : JOHN MARSALLI was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

Trial Examiner Bayly: State your full name and address for the record.

The Witness: John Marsalli; Ricci & Company.

By Mr. Forkner:

Q. You are recognized as the owner of this business?

A. Yes; I am the owner.

Q. Where is it located?

A. At 162 West Superior Street, Chicago, Illinois.

Q. What business is that?

A. Salted nut business; all kinds.

Q. How long have you been in that business?

A. Twenty-six years.

Q. What do you sell?

A. We are selling all kinds of salted nuts and plain nuts.

Q. And do you sell mixtures also?

A. Yes, sir.

Q. And have you since 1936 down until 1945 sold nuts?

A. No; not any nuts until 1940.

Q. Have you sold nuts and mixed nuts to the Automatic Canteen Company of America?

A. Yes, sir.

Q. What was your conversation with Mr. Boid after 1936 in regard to selling peanuts, mixed nuts, etc.?

A. Most of the conversation was like this: Once in a

while he used to come over to our office or he used to call me to go over to his office, and he would give us some kind of specification on the mixed nuts, what quantities of peanuts and pecans and cashews he wanted in the mixture.

Q. Did they also tell you what price they wanted it to be?

A. Sometimes it was; sometimes it wasn't.

Q. Sometimes they would tell you what price?

A. Well, yes.

Q. Those conversations were with Mr. Boid?

A. Yes.

[fol. 66] Q. And he would tell you at certain times what prices he wanted?

Mr. Howrey: If Your Honor please, I object—

Trial Examiner Bayly: Objection sustained.

By Mr. Forkner:

Q. What did you say to him in these conversations, in regard to price?

A. With regard to price, once in a while he would give us the price—and we could see what price we could get from a different concern, quite a few here in Chicago.

Q. Did he have it in the form of a list that he showed you, or did he just tell you?

A. No, they only told us the price, but he never showed us what the mixture—

Q. He would tell you the price, but he wouldn't tell you the mixture?

A. No; he would tell us what he wanted in there, and then he would tell us the price, what they can buy it for, so then he says, "If you meet it, the business is yours." That's it.

T. J. TYNAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Trial Examiner Bayly: State your name and address for the record.

The Witness: Thomas J. Tynan—T-y-n-a-n.

By Mr. Forkner:

Q. And you are the Assistant Manager and a partner of McCarry Nut Products Company, a partnership?

A. Yes, sir.

Q. Is that the successor to the Illinois Nut Products Company—or Corporation?

A. It is.

Q. Are you located at 612 West Lake Street, Chicago, Illinois?

A. That is right.

Q. How long have you been in the nut business?

A. Since 1923; about 23 years.

[fol. 67] Q. And has your company been in existence that length of time?

A. No. When we sold to the Canteen Company we operated under the Illinois Nut Products Company, and that company dissolved December 31, 1943, and with the dissolution of the company the records went with it, and I can't verify any prices.

Q. State what you know about the price that was fixed for these licorice pellets.

A. My memory doesn't serve me correctly for the exact figure at which we sold them at that time. As near as I can remember it might have been \$1.75, maybe \$2.00—\$1.75, I think. I never negotiated business direct with the Automatic Canteen Company. It was my representative, Joe Raggi who used to go over there. We would make up some bars and take them over to the Automatic Canteen. We would have a price to sell them at, say, \$1.90, I'm not sure. They would say, "We may be able to take that bar, we can use it, if you can quote us \$1.75." Then maybe we would make the thing not so big, and then send it back to them and make them a price of \$1.75. But we didn't get the business anyway—only on that one package I mentioned.

Q. What was requested of your firm?

A. Well, the bar we would submit, if we had a price of, say, \$2.00 on it, they would say, "Make it \$1.75, if you can."

Then maybe we would make it a little smaller and take it back to them. And we only got the one sale out of them on the one item.

By Mr. Howrey:

Q. Did you or any representative of your company ever tell Automatic Canteen Company that your price differential to them was in excess of your saving in cost in serving them?

Mr. Forkner: Just a moment. I wish to object, Your Honor, to the question. The matter has been gone over and the ruling has been had, and I therefore ask that the same ruling be invoked each time the question is asked.

Trial Examiner Bayly: Do you understand that question? [fol. 68] The Witness: Yes, I do, and I told them, or my representative, that the price sold to them was lower than the cost.

Trial Examiner Bayly: You didn't tell them that?

The Witness: No, I didn't.

Trial Examiner Bayly: Does that meet with your understanding of what the answer should be?

Mr. Howrey: Yes. I am satisfied.

J. P. SCHMIDT was therupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

Trial Examiner Bayly: State your name and address for the record.

The Witness: Julius P. Schmidt, 4631 West Blue Mound Road, Milwaukee 13, Wisconsin.

By Mr. Forkner:

Q. And you are with the Ziegler Candy Company?

A. The George Ziegler Candy Company, Milwaukee, Wisconsin.

Q. Have you been in the candy business long?  
A. Forty-one years.

Q. What types of candy have you made since 1936?  
A. We have made anywhere up to 160 items.

Q. And have you made five-cent candy bars?  
A. Yes, sir.

Q. To what class of trade have you sold those bars?  
A. To all classes of trade.

Q. Have you sold candy bars to the Automatic Canteen Company during those years?  
A. Yes, sir; not since before 1936.

Q. In 1936?

A. No, not in 1936. The record will show you there when we sold to Canteen Company.

Q. When did you start selling to the Canteen Company?  
A. I believe it was 1938.

Mr. Forkner: What we want to know is what Mr. Boid said to you when you talked to him about selling candy from [fol. 69] 1938 on, and particularly when the price of \$2.05 was fixed in 1938, the price of \$2.10 in 1941, the price of \$4.70 for the 200-count in 1942 in other words, what factors or what did he mention—

The Witness: Mr. Forkner, we made the prices.

Q. Let's look at that letter. I show you Commission's Exhibit 28-F, a letter dated April 13, 1943, which is addressed from you, I believe, the Sales Manager, to Mr. Boid of the Automatic Canteen Company.

A. That is correct.

Q. And in this letter it says: "Pursuant to recent discussions as to the method of arrival at the costs on merchandise shipped to you, I would like to give you the following information. We have taken into consideration in these costs, the lack of credit risk, the savings in packaging, the elimination of freight, selling costs, and deductions for returns and allowances." Now, did Mr. Boid state that in his recent discussion with you?

A. That letter was written as a result of the original

action against the Automatic Canteen Company, and Mr. Howrey and Mr. Gravelle discussed that with us, and I don't recall whether Ralph Boid was in that discussion or not. Do you, Mr. Howrey?

Mr. Howrey: I believe he was, yes.

The Witness: That letter was written as a result of that discussion at that time. You asked me the other day whether I would recall whether or not or why this letter was written, and that is my answer to you now.

Mr. Forkner: What was that answer?

Trial Examiner Bayly: Let's let that stand.

Mr. Forkner: I would like to have the answer read. Did you say that you were advised by Mr. Howrey and Mr. Gravelle to write this letter of April 13, 1943?

The Witness: I don't believe so. That letter was written as a result of a discussion with Mr. Howrey and Mr. Gravelle, in 1943, I believe. Do you recall that, Mr. Howrey?

Mr. Howrey: Yes.

Trial Examiner Bayly: Go ahead.

By Mr. Forkner:

Q. How did you happen to be talking to Mr. Gravelle and Mr. Howrey in 1943, in regard to the letter that you wrote to Mr. Boid of the Automatic Canteen Company? I mean, [fol. 70] what connection do they have with your writing this letter?

A. They came in to see us at the time that the original— Let me ask you a question, or may I?

Q. You are answering the questions.

A. My understanding of it, Mr. Forkner, is that that was when the original suit was brought against the Canteen Company.

Q. Was that right after I paid a visit to your office, together with Mr. Van Wagoner of the Federal Trade Commission?

A. That was a long time before that, Mr. Forkner.

Q. This letter of April 13, 1943, was dictated by you?

A. Yes.

Q. Was it checked over by Attorney Howrey and Attorney Gravelle?

A. No, sir.

Q. Was it written as a result of a discussion with them?

A. It was written as a result, possibly, of a discussion with them.

Q. What was the advice which you obtained on that at that time upon writing that letter?

Mr. Howrey: I object, unless he identifies as to who gave him the advice first.

By Mr. Forkner:

Q. Mr. Gravelle or Mr. Howrey?

A. I don't remember that we had any advice. You mean as to the writing of the letter? No; we had no advice.

Q. What was this recent discussion that you referred to with Mr. Boid?

A. I said to you that I believed Mr. Boid was in that discussion with Mr. Howrey and Mr. Gravelle at that time.

Q. You think Mr. Boid was present?

A. I am quite sure he was.

Q. And where was this discussion?

A. In my office at Milwaukee.

Q. What was the date of that?

A. April 43, 1943.

Q. Did Mr. Boid at that time or any other time bring to your attention the different savings or advantages or reasons why they should have a lower price than you sold to others per unit of bar?

[fol. 71] A. I don't believe the statement of a lower price was ever made at any time. The fact of the matter is—

Q. Did he state the advantages?

A. The fact of the matter is that Automatic Canteen never said that we had to sell them at this, that, or the other price.

Q. Did they, also, though, ask you or state to you the factors which you should consider in giving them a price? I want an answer on that. Did they state to you the factors that you should consider in giving them a price? You can answer yes or no on that.

A. Am I permitted to answer on any definite or specific time? I don't remember any such time.

Q. Any time whatever.

A. Undoubtedly we discussed it, Mr. Forkner; unquestionably those things were discussed.

Q. I want to know whether it is unquestionably true that Mr. Boid mentioned these factors to you at any time at all in order that he have a special price. Put it that way, if you don't like "lower" price.

A. Well, Mr. Forkner, I would like to call your attention to the fact that in selling other operators similar merchandise our differential was only five cents per 100-count.

Q. We noticed that on there on those years; then we noticed a spread in the differential as you go on down through the years. It starts in at five cents, but then jumps higher.

A. It jumps to \$2.35 right there, but you will notice here, too, that there is absolutely no 100-pack to any other operator with the exception of the Canteen Company, and the other operators bought at 68 cents, which was a question of

Trial Examiner Bayly: Justification of that price?

The Witness: That is right. Now, another reason why we discontinued the 100-pack to other people was not so much the price as the disturbance that it caused in the retail market. We discontinued the 100-pack to independent operators simply because that 100-pack was taken out and sold to the retail trade and used as a means to break down the jobber's price to the dealer. Therefore, we discontinued it.

Q. State now for the record what the fact is, whether or not Mr. Boid, in this conversation previously to this letter, asked you for a lower price.

[fol. 72] Mr. Howrey: He has answered that, Your Honor.

Mr. Forkner: Just let him answer again now.

The Witness: I don't even remember what I answered you. If you are trying to make me say that he specified a price, Mr. Forkner, he did not.

G. H. WILLIAMSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Your name is George H. Williamson, and you are President of the Williamson Candy Company?

A. Yes.

Q. And what is your business?

A. The Company?

Q. Yes.

A. Manufacturer of candy bars.

Q. What type of candy bars do you make?

A. A nut roll named Oh Henry.

Q. What do they retail for to the consumer?

A. Five cents.

Q. Who took care of those arrangements in regard to the sale of candy bars to the Respondent?

A. I did.

Q. And who did you talk to in that regard?

A. Mr. Boid.

Q. Mr. Boid. Where did you talk to Mr. Boid, if you can recall?

A. The Chicago Athletic Association.

Q. Will you state how you happened to meet him, and what the substance of your conversation was, in your own words?

A. Previously I had met Mr. Leveron somewhere, and it probably was as a result of that meeting with Mr. Leveron that the subsequent meeting—

Q. Will you first relate the conversation with Mr. Leveron, and then follow with Mr. Boid?

A. Well, this is all just—

Q. According to your best recollection.

[fol. 73] A. At a social gathering he asked me why we didn't do any business with them, and, as I recall, I said I didn't know. He said, "Well, let's talk it over some time."

So, I met him again, I don't recall how much later, and we made an appointment, and then I went down to his office and we talked generalities there, and we went down to the Club in the Merchandise Mart, and we talked generalities again.

(The reporter read the question as follows:

"Q. State whether or not Mr. Boal stated the factors or the savings or the advantages which entitled the Automatic Canteen Company to have a lower price, or better price, or special price.")

By the Witness:

"A. I can't recall his stating that. He would naturally, if we were considering doing business together, discuss the nature of their business and what we would have to do in order to sell them.

Q. Of those elements, what were the three elements of cost or reasons for lower price that were discussed that day?

Mr. Howrey: If Your Honor please, I object to that. Mr. Forkner hasn't yet shown that there were any lower prices discussed or that any elements of lower prices were discussed. I wonder if I may ask to have that question read back.

Trial Examiner Bayly: Read it back, Mr. Reporter.

(The reporter read the question as follows:

"Q. Of those elements; what were the three elements of cost or reasons for lower price that were discussed that day?"

Mr. Howrey: If Your Honor please, this witness hasn't testified that there were any reasons for lower prices discussed, so I don't think he should be asked what the three elements were. I think his testimony indicates that they didn't discuss reasons for lower prices.

Mr. Forkner: I object to counsel trying to tell the witness what to say by making objections and having the question read back.

Trial Examiner Bayly: Suppose you ask him what they did discuss and then go on from there.

[fol. 74] By Mr. Forkner:

Q. What are the items that were discussed?

Trial Examiner Bayly: You are talking about costs now, aren't you?

Mr. Forkner: Price; fixing the price.

The Witness: I don't know how to put an answer to you, Mr. Forkner.

Trial Examiner Bayly: All right. You were dealing with Automatic Canteen, and you were expecting to sell them your product. What took place? What did you talk about? You weren't going to give it to them, were you?

The Witness: No, certainly not. Neither were we trying to sell them. I would assume that our conversation would have got to the point of asking how you do business, and the nature of your arrangements, such as that shipments were not handled on our customary basis which was f. o. b. destination; and furthermore that it wasn't desired or necessary for our salesmen to deal with any of their branches or distributors.

Trial Examiner Bayly: Why didn't they want your salesmen to deal with their distributors?

The Witness: I don't know. There was also the question of packing that came into discussion. We were making, I believe, 60-packs, and 100-packs, and 24-packs, and I think at that time I preferred the 100-pack—I'm not sure. Now, you want to know what I said at that time?

By Mr. Forkner:

Q. That is, what he said; that is correct?

A. What would be the subject of our discussion?

Q. Yes; what did you say then?

A. I told him that I knew nothing about what the item of freight would amount to, any savings on that, nor did I have exactly any savings in sales expense, and nothing in packing costs, but that I would have our office figure them out and then we would submit a price to him. I don't know what else would be discussed with him. I do recall that we probably had lunch, talked generalities, and we may have

sat around for a couple of hours afterwards. I said to you, Mr. Examiner, that I was not trying to sell them. We weren't trying to sell them. We had done business for a long time, and it was a case of their wanting our merchandise, and as a good salesman I wasn't going to seem too eager to sell them.

Q. That is right, so that it was more or less Mr. Boid's [fol. 75], trying to sell you; is that correct? Or he was trying to get the candy?

A. It was more like this: "You're a good company, and we're a good company; why shouldn't we be doing business together?"

By Mr. Forkner:

Q. Why didn't you sell to him in 1936 or 1937 or 1938, if you know?

A. I didn't think they would pay our price.

Q. Was that based on prior conversations that you had with officials of the Respondent?

Mr. Howrey: If Your Honor please, I object, unless those conversations took place subsequent to the date of the Act.

Mr. Forkner: I am just seeking the support for his belief that they would not pay his price.

Mr. Howrey: I move to strike what Mr. Williamson thinks. We have to limit this to what was said, and what the facts are subsequent to the date of the Act.

Mr. Forkner: His belief can be founded on the facts which he knows about and which were prior to that time of the Act itself.

Trial Examiner Bayly: We will let his statement stand. As to his ideas, counsel may cross-examine on that. The dealings in 1936 and thereafter are what we are interested in, Mr. Williamson.

By Mr. Forkner:

Q. Did the same situation exist when you started to talk to Mr. Boid and Mr. Leveron in 1940 or just prior thereto, namely, that you didn't think you could sell to him because of price?

Mr. Howrey: If Your Honor please, he is asking—

Trial Examiner Bayly: It might be a little bit leading,  
Mr. Forkner.

Mr. Howrey: He is comparing it with something prior  
to 1936; it is the same situation—

Trial Examiner Bayly: Ask him what the situation was.

By Mr. Forkner:

Q. What was the situation, Mr. Williamson?

A. I was on a fishing expedition to see whether I could  
or not—

[fol. 76] Trial Examiner Bayly: Go ahead. What did you  
find out?

A. Apparently all that they wanted us to do was to pass  
along the savings from our regular price that would be  
effected by not paying the freight or sales expense, or  
any savings that resulted from the more inexpensive pack-  
aging.

Q. In other words, they wanted a lower price.

Mr. Howrey: If Your Honor please, I object to coun-  
sel's—

Mr. Forkner: I will withdraw.

Trial Examiner Bayly: His testimony was very clear,  
distinct and precise.

Mr. Forkner: I withdraw.

By Mr. Forkner:

Q. State whether or not the purpose of that was to  
secure a lower price.

A. Certainly.

WALTER F. EGGERT was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Give your full name and address to the reporter, Mr. Eggert.

A. Walter F. Eggert; E-g-g-e-r-t, 700 South Kilbourn Avenue, Chicago, Illinois.

Q. That is your home address?

A. That is the office address. Do you want the home address?

Q. You might give it to us.

A. The home address is—I live in the country where I don't have a street number or anything like that. I have a rural route or box.

Q. Give that.

A. Route 1, Box 379-A, Wheaton, Illinois, although I live out of Glen Ellyn.

Q. Are you the secretary and general manager of the Euclid Candy Company of Illinois, Inc.?

A. Yes, sir.

[fol. 77] Q. What were your connections in the candy business before 1942?

A. From 1931 to 1942, I was with Bishop & Company, Los Angeles, California.

Prior to 1931 I was with the National Biscuit for about a year. National Biscuit owned Bishop & Company, by the way.

Q. And will you state what the 24-count was sold for during that period?

A. Yes, usually at 64 cents, but there were always deals by one firm or another.

Q. Now, subsequent to the early part of 1942, when you were connected with the Euclid Candy Company, did your company sell a 24-count at 68 cents?

A. Yes, sir.

Q. Are you familiar with the prices at which candy was sold from the early part of 1942 in the 24-cent count?

A. Yes, sir.

Q. State what other national five cent candy bar companies sold their candy at.

A. 68 cents was the general price of all the candy companies with few exceptions. Some of them were 64 cents.

Q. And to a large extent, state whether or not there were many deals during that period—free goods?

A. I never heard of it, not subsequent to 1942.

Q. Was that because of the changed conditions existing?

A. Evidently. It is with our company.

FRANK J. ELLIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. You are located at 410 North Michigan Avenue, Chicago, Illinois?

A. Yes, sir.

Q. And you are engaged in the business of making gum of different kinds and brands?

A. We are in the business of manufacturing and selling chewing gum.

[fol. 78] Q. And your company is a Delaware corporation with offices at 410 North Michigan Avenue.

A. That is right.

Q. And can you name the officers of your company?

A. The officers of the company are:

Philip G. Wrigley, Chairman of the Board;

James C. Cox, President;

W. H. Stanley, Vice-President;

B. L. Atwater, Vice-President;

Frank J. Ellis, Vice-President.

R. R. Holcomb, Vice-President;  
 Earl D. Atwater, Treasurer;  
 Dennis Sullivan, Assistant Secretary;  
 W. S. Reid, Comptroller.

Q. What are the principal brands of gum that you make?

A. The principal brands are Spearmint, Doublemint, Juicy Fruit; P. K. was one of our principal brands at one time.

Q. And in what size packages and the number of sticks per package do you vend or sell gum?

A. Standard brands of chewing gum, our brands, sold to the general trade are packed five sticks to a package, 20 packages to a carton, 50 cartons to a case, ordinarily.

Q. I see. Now, selling the Automatic Canteen Company at 38 cents per hundred sticks, or \$19.00 per fifty boxes for 1936 on down to the present time without any change, while, at the same time, other customers of yours were charged 56 cents and 55 cents per hundred count, makes an increase of approximately 30.9 per cent, does it not, in price?

A. Approximately.

Q. So that as to the nine million approximately four hundred thousand dollars of sales from 1936 on down to 1946, it would amount to almost three million dollars in savings, wouldn't it?

A. Approximately that, yes, if that total figure is correct.

Trial Examiner Bayly: We are concerned here about differences in price which Wrigley gave to this respondent in relation to others, we will say, operating in the same field and under these specific kinds of conditions.  
 [fol. 79] Now, Mr. Reporter, read Mr. Forkner's question and we will see if there is anything in there that is really objectionable.

(The reporter read the question as follows:

"Q. Now, on what basis did you grant this or did they secure from you this concession in price as against, we will

say, not only other jobbers and chain retailers, but other vending machine operators?"')

Trial Examiner Bayly: Can you answer that?

The Witness: I will try to answer that.

There is a range in prices to vending machine operators of about 2 cents, 38 to 40, with some varying degrees of terms for payment. The price that Automatic Canteen has been paying for gum was established back in 1934, I believe,—1935, and it remained virtually continuously the same throughout.

Trial Examiner Bayly: That was 1934 you said?

The Witness: 1935.

The reason for those differentials in prices of two cents or thereabouts is rather difficult for us to explain. That is the way it grew up. But Canteen Company was spread all over the country, distribution was increasing and improving. For instance, we only have one billing for some hundred and some odd operators and that makes it a considerable savings against the same distribution against a large number of dealers or units and outlets.

Trial Examiner Bayly: Stenographic work on that job?

The Witness: That is right.

And there was a savings in material costs.

May I answer that question to you off the record?

Trial Examiner Bayly: No. You go ahead and answer it the best you can.

The Witness: For instance, we had merchandise offers to the regular trade that were rather costly. Canteen had no advantage of those by the very nature in which they did their business. We have a large staff of salesmen and, because of the supervisory work, the Canteen Company, or, for that matter, other vending companies, vending operators, it wasn't necessary to spend some field time in the promotion and distribution of goods through those media, and so on.

There are a number of differences. I don't know whether I have enumerated them all or not, but there is a difference between—

[fol. 80] By Mr. Forkner:

Q. Now, when did you stop these merchandise sales that you spoke about to the trade, meaning the jobbing trade?

A. When we stopped them?

Q. Yes.

Mr. Howrey: If your Honor please, he was just finishing the sentence.

Trial Examiner Bayly: Did you have something more?

The Witness: I was going to complete that.

Mr. Forkner: Go ahead.

The Witness: Would you read that back?

Trial Examiner Bayly: Read back the latter part of his answer and let him finish it.

(The reporter read the record as follows:

"I don't know whether I have enumerated them all or not, but there is a difference between——")

Mr. Forkner: Go ahead and finish it.

The Witness: (Continuing.) —between the cost of doing business with vending machine operators and what we call our regular trade, in addition to a savings in the manufacturing and packing of the product.

Now, in 1941 we wrote a letter to the Commission at their request covering those items.

Trial Examiner Bayly: Proceed with your questions.

By Mr. Forkner:

Q. Now, when did you stop merchandise offers to the trade that you mentioned in respect to the passage of the Robinson-Patman Act as of June 19, 1936? Did you stop before or after that?

A. Merchandise offers?

Q. Yes.

A. Merchandise offers were continued by us up until just before the war when merchandise was getting scarce and scarce.

Q. What do you mean by "merchandise offers"?

A. I mean combinations offered to the retailer through the jobbers, such as sun glasses, pencils, and so on.

Q. That was for the retailer?

A. Yes, for the retailer.

Q. Not for the jobber?

A. For the retailer through the jobber.

[fol. 81] Q. I mean, the jobber did not get anything out of that?

A. The jobber sold the combination offer to the retailer.

Q. But he got no benefits from those offers other than just the fact that he was pleasing the customer?

A. Other than the fact that it was a business promotional operation. He made a profit.

Q. I mean, the benefit of the discount was not received by the jobber who was your customer?

A. I would like to answer these questions carefully and right, if I could understand just exactly what you mean.

Mr. Howrey: If your Honor please—

Trial Examiner Bayly: Let us see. Do you understand the question?

The Witness: No, I don't understand it.

Trial Examiner Bayly: Read the question to him.

(The reporter read the question as follows:

"Q. I mean, the benefit of the discount was not received by the jobber who was your customer?"

The Witness: I didn't think discount was involved here.

By Mr. Forkner:

Q. Who received this free goods that you spoke about—the jobber or the retailer?

A. The best way to answer that question is to explain the mechanism.

Q. No. Just answer my question.

A. What? The merchandise?

Q. The free merchandise you were talking about.

A. The merchandise was sold to the jobber.

Q. All right. That is all.

A. The jobber sold it to the retailer.

Q. And you understand that in the trade there are certain deals or merchandise deals which are denoted as con-

sumer deals, retailer deals and jobber deals. Are you familiar with that terminology?

A. We don't use that terminology.

Q. Well, where the benefit comes to the jobber, the free goods; that we will say is a jobber deal; and, where the benefit comes to the retailer and he gets the free goods, that is a retailer deal; and so on.

Now, my question is this: Did any of these deals, free goods,—was it to be kept by the jobber or the retailer?

A. In some cases it was kept by the jobber and, in some cases it flowed to the retailer.

[fol. 82] Q. Describe one of those deals that was in existence since 1936, June 19th.

A. Let us see if I can think of one now. Take in the case of an ordinary combination offer. There would be some boxes of gum and a piece of merchandise offered at a total price. The jobber would buy and order and receive the merchandise from us and sell it to the retailer.

Another example of a method of doing business on merchandise offer was known as our "Red Book Deals." It was a catalog. The jobber bought from us, we will say, 25 boxes of gum and a stool. He could either keep the stool himself, sell it, give it away or do as he liked—whatever he liked with it.

And, then, too, there are many cases, hundreds of them.

Q. All right. That is enough.

Did you give the jobber the choice of whether he wanted the stool or whether he could have the discount on the gum?

A. The discount and the merchandise offer had no relationship to each other at all.

Q. Now, in the case of the respondent, is it your claim that you gave them discounts equivalent to the elimination of such deals?

A. It wasn't measured exactly that way.

Q. It wasn't?

A. No. They didn't get the benefit of that. That is all I know. Those deals weren't offered to them. They weren't carrying on that kind of a business. It didn't fit into their picture at all.

The Witness: The vending machine end of our business was never very large. Normally, it only represented approximately 6 per cent of our total business.

Because of the nature of the vending machine business and because the consumer, when he takes merchandise or business merchandise through an automatic merchandising device, particularly if it is well known branded goods, if the goods are not kept vendored up to the highest standard of efficiency and, if the operations of these various vending machine outfits, as far as service and other important elements in the operation are not on a high standard, the manufacturer gets the onus, not the vending machine operator.

Trial Examiner Bayly: So, then, you say you picked these because you thought they were a little better?

[fol. 83] The Witness: We picked them because, according to our judgment, they were operating on the basis and standard that we required.

Mr. Forkner: Read the question, please.

Trial Examiner Bayly: Read it.

(The reporter read as follows:

"Q. What was it based on, your understanding why the price of thirty-eight cents less two per cent was given to the Automatic Canteen Company back there and never has been changed since 1935? Can you answer that?"

The Witness: I don't think we made any changes.

By Mr. Forkner:

Q. I say, why did you give it to them back there? What was your understanding on which you based such a discount of thirty-eight cents less two per cent?

A. I didn't negotiate it and I couldn't tell you.

Q. You don't know?

A. I don't know.

Q. Who does know?

A. I wouldn't know.

Q. You don't know who in your company would know?

A. I don't remember. There is nothing in the record that shows it.

Q. In other words, you don't know why that discount was given?

A. No, I don't. The answers that I have given were probable reasons. I don't know.

EDWARD L. POLKOW was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

Mr. Forkner: At this time I have called, your Honor, Mr. Edward L. Polkow, who was formerly office manager of the Paul F. Beich Company, Bloomington, Illinois.

By Mr. Forkner:

Q. Now, will you please give your present address, Mr. Polkow?

[fol. 84] A. 942 Linden Avenue, Oak Park.

Q. And how long have you been employed, up to recently, with the Paul F. Beich Company?

A. About 30 years.

Q. Oh. Well, you are familiar with the prices of the companies whose names you read off, is that right?

A. Probably, yes.

Q. Approximately?

A. Yes.

Q. And approximately those are the companies that you had in mind when you said that most companies sold candy before the war at 24 count, 64 cents?

A. That is right.

Q. And after the war began, 24 count, 68 cents?

A. That is right.

Q. And 100 before the war at what price?

A. \$2.50.

Q. After the war?

A. \$2.65.

- Q. How did you gain that familiarity with those prices?  
 A. From the trade.  
 Q. By what means, price lists?  
 A. In some cases. In some cases, invoices.  
 Q. Other cases?  
 A. Just—  
 Q. From talking to people?  
 A. Talking to the trade.

Q. State whether or not you tried to sell at any time the 24 count to the Automatic Canteen Company.

- A. Yes.  
 Q. What was the result?  
 A. We couldn't sell them because they were buying exclusively from several manufacturers.  
 Q. Did you quote them a price on that?  
 A. I believe so.  
 Q. What was that price?  
 A. 64 cents.  
 Q. Who did you talk to over there?  
 A. Mr. Swanson and Mr. Anderson, I believe.  
 Q. What other reasons did they tell you they couldn't buy your candy for?  
 A. It was on account of the shape.

- [fol. 85] Q. On account of the what?  
 A. Shape.  
 Q. What other reasons other than that?  
 A. None that I remember.  
 Q. Now, later on did you accompany Mr. Otto Beich in a visit with Mr. Swanson and Mr. Anderson?

- A. Yes.  
 Q. Was that just previous to the time that you began selling to the Automatic Canteen Company?

- A. Yes, sir.  
 Q. And will you tell about that conversation, where it was and what happened?  
 A. Well, it was in the Merchandise Mart, and Mr. Swanson and Mr. Anderson tried to get us to make a bar that would fit their machine.

- Q. Yes?  
 A. And package it in hundred count.

Q. For how much?

A. Well, around two cents a bar.

Q. And just tell us the different things that were mentioned by Mr. Swanson and Mr. Anderson during the conversation. Just relate to the best of your knowledge and belief.

A. Well, the packaging of the bar, the changing of the bar, the price, which I mentioned.

Q. What price was that?

A. Around two cents a bar.

Q. All right.

A. And the reason for that was their setup was entirely different than the regular trade.

Q. Who stated that?

A. I don't remember.

Q. I mean, between—you are stating things said by Anderson or Swanson?

A. Swanson.

Q. Go ahead.

A. That their cost of operation was far greater due to the fact that a certain percentage had to be paid in replacements and they hired different type salesmen, and their methods of handling were entirely different. At that time we decided that Otto was going back to Bloomington to see if he could work out a bar.

Q. Which would be at what price?

[fol. 86] A. Around two cents.

Q. Now, state whether or not anything was mentioned by either Swanson or Anderson about the cost of their machines and the upkeep and so forth?

A. Yes, that was brought out.

Q. By them?

A. Yes.

Q. State whether or not they mentioned to you that they were buying bars from others at a cheaper price?

A. They were buying bars around that price.

Q. Did they tell you that?

A. Yes.

Q. Now, as a result of that, did you sell to the Automatic Canteen Company a bar costing around two cents?

A. Yes.

Q. What was the price?

A. I think it was \$2.05 a case at that time.

Q. Was that for the 100 count?

A. Yes.

Q. Later did you sell the same bar to others than Automatic Canteen?

A. Two or three years later I believe.

Q. At what price did you sell it to others later?

A. \$2.50.

Q. \$2.50?

A. Yes.

Q. And was the Canteen Company still getting \$2.05?

A. \$2.05 fob Bloomington, but—

• • • • •  
By Mr. Forkner:

Q. What was the conversation that you had with Mr. Boid?

A. Mainly getting the orders.

Q. Not "maybe"—what was the conversations you had?

A. Getting business, orders.

Q. Yes. What did he say and what did you say?

A. I said we were not getting enough business, possibly.

Q. Oh, well, did you ever say that to him?

A. I think so.

Q. All right. What did he say then?

A. Well, there were several reasons.

[fol. 87] Q. All right. What were they?

A. First, our shipping case was out of proportion to the competitors' and I think he mentioned price.

Q. What about price?

A. It was too high in comparison.

Q. Why?

A. In comparison to—

Q. What did he say it was too high for?

A. In comparison to other bars.

Q. Did he tell you that?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. Now, tell about the conversation what was it?

A. Well, we tried to find out why we were not getting the business, why we, why they were selling a lot more of competitive items than ours, and we would do everything we could which pertains to selling merchandise.

Q. What did you find out in general?

A. Well, that our pack was wrong at that time.

Q. Yes.

A. And our price was high.

Q. Did they tell you that?

A. Yes.

Q. Did Boil tell you that?

A. Yes.

Q. Did he tell you how much too high you were?

A. No.

Q. Did you know what price he wanted?

A. No.

Q. All you knew he wanted a lower price, is that right?

A. Yes.

[fol. 88] CARL BEHR was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give your full name and address and affiliation?

A. Carl Behr, Vice-President of the Paul F. Behr Company, of Bloomington, Illinois.

Q. What are your duties?

A. Sales manager.

Q. Suppose we quit speculating and get down to what the conversation in substance was.

A. I wouldn't be able to recall exactly.

Q. I do not want it exactly. I want the substance of what was discussed. Was it to increase the sale of bars?

A. For instance; sometimes in the summer we made a summer bar, that we wanted sold in canteens during the summer weather, when the chocolate coated bar was not quite so satisfactory. It was probably on some occasions like that.

Q. What would be the result when you talked about selling these bars, increasing your volume? What did they say?

A. Well, they purchased, at various times they purchased summer bars that probably were sold in their machines for six months or so during the hot weather. They sold the summer bars a number of times.

Q. Did you have to fix a price when you made those sales?

A. We fixed a price, yes.

Q. Then and there?

A. Undoubtedly, we made a price in Bloomington and discussed it in Chicago.

Q. Or did you make the price after you finished your conversation?

A. Our pricing was done in Bloomington and the sales were handled through our Chicago office.

Q. What were the factors that were named by the representatives of the respondent for you to consider in making a price, if any?

[fol. 89] Mr. Gravelle: Now, there is no testimony that the respondent had any factors or had anything to do with the pricing system. The witness testified the prices were determined in Bloomington.

Trial Examiner Bayly: Can you bring that out in a general way, Mr. Forkner?

Mr. Forkner: I think I have done that, but I will ask him again.

By Mr. Forkner:

Q. Can you tell us a little bit more about what was discussed when you were in the office of the respondent after June 19, 1936, on down to, we will say, down to the present time, but more particularly during the earlier period before the war?

A. Originally we sold Automatic Canteen one bar which is still being sold, and practically all contacts after that time were on the subject of summer bars or additional all year around bars.

Q. When you talked about these summer bars, what was said about the price, if anything, or terms?

A. The price would be in relation to what was at that time our price on the year around bar.

Q. I am not concerned so much about what it would be. I am concerned about what was said about them, about the price?

A. We would price a summer bar at the price that they were paying for other merchandise.

Q. I did not ask you what price you would pay. I asked you what things were said in the conversation. What was said; what was said? What did you say? What did the other fellow say, and such?

A. I said that this bar would hold up under adverse weather conditions. It weighs two ounces, for instance, and for five months it will sell better than chocolate bars, and the price is the same or possibly five cents per hundred more than what your prices are.

Q. What did they say to that?

A. Ordinarily they said that we are not interested in that type of a summer bar. Sometimes out of many attempts to sell summer bars they probably purchased them three times, but the criticism was ordinarily on the type of candy or its acceptability to their customers to its standing up qualities.

[fol. 90] Q. Now, did they have any objection to the price or any comments to make on price?

A. I can't remember any objections.

Q. Did they say anything about their cost of the method of doing business, or location rentals or type of men they

have to hire, the machines they had to have, or savings made in freight?

A. We were familiar with that.

Q. Did they state it to you? Did they state it to you?

A. They bought goods f.o.b. factory.

Q. I do not care what they did. Did they talk about freight to you?

A. We quoted them prices f.o.b. factory.

Q. Did they talk about salesmen's commissions, the elimination of salesmen's commissions?

A. Not to me, no.

Q. They did not?

A. No.

Q. Did they talk about no returns for damaged or stale goods?

A. No.

(The reporter read the question as follows:

"Q. What was your understanding in selling from 1936 on as to what the factors were that you were to consider in making a price to the respondent? What were the different items?"

Trial Examiner Bayly: You may answer that.

The Witness: When we made prices originally we made that based on the fact that the buyer paid the freight instead of the seller as is usual, that there was a reduction in selling expense. We knew the credit of the Automatic Canteen Company was very high in comparison with a great many comparable small wholesalers. We had no experience with returned goods and so many probably similar factors. Those are the important ones.

[fol. 91] FRED W. AMEND was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

• • • • •  
Direct examination.

By Mr. Forkner:

Q. Mr. Amend, are you president of the Fred W. Amend Candy Company of Chicago, Illinois?

A. Chicago and Danville, yes.

Q. How long have you acted in such a position as such?

A. Since the company was incorporated in 1921, or formed.

Q. As president of the company, have you been active or inactive in the management and sale of the products of the company?

A. I have been active.

Q. Were you formerly with the Paul F. Reich Company of Bloomington, Illinois?

A. I was superintendent of their Chicago factory.

Q. From what years?

A. 1915 to 1921.

Q. And your factory is located where at the present time?

A. Danville, Illinois.

• • • • •  
By Mr. Forkner:

Q. Now, Mr. Amend, in fixing the different prices which we have just enumerated this afternoon and this morning in regard to the Automatic Canteen Company, did you have conversations with any officials of the Automatic Canteen Company?

Mr. Howrey: Does the question fix the year? I don't believe it does.

Mr. Forkner: Well, I have mixed it by means of reference to this testimony which, naturally, would cover 1936 on down to 1946.

The Witness: We never had any discussion as to price.

By Mr. Forkner:

Q. Are you familiar with the type of operation that that the respondent engages in—how they mark it their product and what they do with it?

[fol. 92] A. Fairly so.

Q. Have the officials of the Respondent Company explained to you their methods of operation at different times?

A. No.

Q. Have they explained to you the potentialities of their business and their method of distribution and its favorable expansion for your candy when you started to sell them in 1937?

A. No.

Q. Did they mention them at any time subsequent?

A. Several times they mentioned what a tremendous number of items they were selling each quarter.

Q. Of other candies or of your candy?

A. Oh, that was everything that they were selling.

Q. Do you know what the purpose of that was?

A. Well, in the first place, I believe they were astonished at the tremendous growth that they were experiencing and in the second place they might have had hopes that I would ask for a part of that.

Mr. Forkner: That is all.

You may cross examine.

Cross-examination.

By Mr. Howrey:

Q. Now, you testified on direct examination with reference to prices of your candy and the prices of candy of other manufacturers with reference to the various counts, the 24-count, the 60-count and the 100-count.

Now, it is true, is it not, Mr. Amend, that those prices vary from each manufacturer depending upon what sort of merchandise deals he may have on at the time, such as free goods or replacement allowances or shelf allowances, premiums, and things of that kind? In other words,

each manufacturer may have a deal and it may be different from his competitors' deals, is that correct?

A. You are certainly trying to make it look different.

Q. And on your books those deals would reflect, in your net price, on that particular customer, would they not?

[fol. 93] A. All deals, premiums, start from exactly the same net amount to the company, whether it is per pound, per box, or per case. Some accounts you have to allow only a 2 per cent discount, so you take the net amount and divide it by 98. You have another account where you pay a brokerage 7 per cent and you divide by 93. Another account you pay freight and a brokerage fee and a 2 percent cash discount. Your net return level to the company is the same.

Am I clear?

Q. You were until you made the last conclusion.

My question is that when you testified that the price was 64 cents or 68 cents you meant by that, did you not, that that was a list price and there might be deals which would affect that list price to various customers. That is what I meant.

A. That is right.

Trial Examiner Bayly: Did these premiums have a dollar value that you could figure into your cost or deduct it, or did you just put that in as a part of a good will offer?

The Witness: They had two values. They had the value of the customer if he had to go out and buy them at retail; and then they had the value to us which we bought as a premium buyer.

Trial Examiner Bayly: And did you figure your cost of those in or compute it in ascertaining your net selling price?

The Witness: The size of the premium offered, the amount of free goods, are all in relation to freight rates and net returns to the company.

Trial Examiner Bayly: All right. You quote a certain price, we will say, on a certain number—

The Witness: That is right.

Trial Examiner Bayly: (Continuing) —and in that shipment you send some free premiums, trinkets, let us call them—

The Witness: That is right.

Trial Examiner Bayly: (Continuing)—now, does the cost of those extra items come out of your quoted price so as to make you a lesser net price?

The Witness: No. We raise our price so that we can include free goods or premiums.

[fol. 94] Trial Examiner Bayly: So that your price quoted is net?

The Witness: That is right.

Mr. Forkner: I will call William C. Jakes of the Curtiss Candy Company.

WILLIAM C. JAKES was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. What is your full name and affiliation with the Curtiss Candy Company?

A. William C. Jakes, production manager of the Curtiss Candy Company.

Q. What are your particular duties?

A. Planning of production, production control, personnel involved, supervision of the plants, all activities in connection with production.

Q. How long have you been with the Curtiss Candy Company?

A. Fifteen years.

Q. What was your first position with the Curtiss Candy Company and your duties?

A. I was in the sales department.

Q. From what years were you in the sales department?

A. First year of my employment.

Q. What year would that be approximately?

A. 1931 to 1932.

Q. Until about what years?

A. 1932.

Q. 1932?

A. I was employed in 1931. I was with the sales division for approximately one year.

Q. Then what was your new title and what were your new duties after 1932 until what year?

A. I was engaged in production activities of one of the plants; from there as plant superintendent, personnel director; and then as production manager.

Q. Until what year?

A. The present time. Do you want the termination date on all of those steps in my progress?

[fol. 95] A. No, that will not be necessary. Thank you, Mr. Jakes.

How long have you been handling the account of the Automatic Canteen Company of America?

A. I believe since about 1938 or 1939.

Q. And with whom did you have contacts during that period of time?

A. Mainly with Mr. Boid.

Q. Was it your sole function to secure and negotiate for the sale of candy to the respondent here, the Automatic Canteen Company of America?

A. I represented the company in our contacts; decisions had to be approved by the office, of course.

Q. I wanted the conversation that you had or the substance of the conversations you had with Mr. Boid. Will you tell it, in your own words about this price change at that time?

A. I think that would be usual discussion between the buyer and the seller in trying to arrive at a friendly basis for doing business. It was finally agreed upon that the price of \$2.05 would be acceptable.

Q. This is what I want to know. State whether or not Mr. Boid brought to your attention certain items that you should consider in making a price to him?

A. I can't recall for sure, but undoubtedly that is the case because that was the basis for the spread and it was always recognized by our company.

Trial Examiner Bayly: You, in turn, were trying to get a price that would make you a legitimate profit based on your increased costs, is that right?

The Witness: That is right.

Cross-examination.

By Mr. Howrey:

Q. Mr. Jakes, referring to Commission's Exhibits 17-A to H, the net result of the negotiations covering the short period represented by those exhibits was that you did increase your price to Automatic Canteen Company, did you not?

A. That is correct.

Mr. Howrey: May I ask the reporter to mark these documents as proposed Respondent's Exhibit No. 3 series? [fol. 96] They are copies of invoices between the Curtiss Candy Company and the Automatic Canteen Company of America.

(The documents referred to were marked Respondent's Exhibit 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, and 3-P, for identification.)

By Mr. Howrey:

Q. Mr. Jakes, I show you proposed Respondent's Exhibit No. 3 for identification and ask you what it represents, what it is?

A. That is an invoice from the Curtiss Candy Company to the Automatic Canteen Company, dated December 8, and covering a shipment of our merchandise to the Automatic Canteen Company.

Q. Are there a number of other invoices in that exhibit?

A. Yes, there are.

Q. What period of time do they cover?

A. From December 8th to December 15th, 1939.

Mr. Howrey: If your Honor please, I offer proposed Respondent's Exhibit No. 3 for identification, series A to P, in evidence.

Trial Examiner Bayly: Has counsel for the Commission seen these?

Mr. Forkner: No. I will look them over now.

Trial Examiner Bayly: As part of the respondent's cross-examination of this witness, such proposed exhibits may be received in evidence.

(The document referred to, heretofore marked for identification, Respondent's Exhibit 3-A, 3-B, 3-C, 3-D; 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O and 3-P, were received in evidence.)

Mr. Forkner: No objection.

By Mr. Howrey:

Q. Mr. Jakes, refresh your memory from Respondent's Exhibit No. 3-A, to 3-P. Will you state for the record what price Curtiss charged the respondent from December 8, 1939, to December 15, 1939?

A. \$2.10 per carton, less freight allowance of 5 cents per carton.

Q. That was the same price, was it not, as was charged prior to November 13, 1939, the date of Mr. Anderson's letter to Mr. Schmering?

A. From this accounting statement I would say, "Yes."

[fol. 97] Trial Examiner Bayly: This covers all the sales for that period, does it, Mr. Howrey?

Mr. Howrey: I have submitted it merely as a sample. I have not had time to get all the invoices out, but I can get them.

Trial Examiner Bayly: No. Very well. I just wondered if it covered that.

By Mr. Howrey:

Q. You stated, Mr. Jakes, that you had charge of the Canteen account from 1939 to 1942. Will you please state whether or not it was a fact that prices to Automatic Canteen Company increased gradually during that entire period?

A. Yes.

Mr. Howrey: Could I have, Mr. Reporter, Commission's Exhibits 59-A to C?

H. STANLEY GRAFLUND was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Mr. Graflund, you are now the vice-president and secretary of the Shotwell Manufacturing Company?

A. I am.

Q. When did you start with the Shotwell Manufacturing Company?

A. September, of 1930.

Q. And what was your position with them at that time?

A. Cost accountant.

By Mr. Forkner:

Q. Now, you sold the 24-count size bar before the war, from 1936 on down to the beginning of the war?

A. To the beginning of the war. That is correct.

Q. At what price did you sell your candy?

A. Our price was listed at 64 cents a box.

Q. That was sold to what type of trade?

A. Principally the candy jobber.

Q. Would that include some vending machine operators, independent operators?

[fol. 98] A. It might.

Q. Now, in 1942, or at the beginning of 1942, on down to the present time, what price were your 24-count candies sold at?

A. 68 cents a box, delivered.

Q. What were the prices of bars that competed with your bar during the same period of time, 1936 on down, in the 24-count?

A. Well, of course, 64 cents a box was the standard price but there were variations.

Q. Due to deals?

A. Right.

Q. Now, after 1942 or the beginning of 1942, was the standard price 68 cents on 24-count except for temporary deals?

A. I would say, "Yes." There were no deals at 68 cent a box for the price.

The Witness: In my recollection, Mr. Nason left our office with no specific instructions as to how much he was to ask. He came back with the price:

Does that answer you?

By Mr. Forkner:

Q. What was your understanding as to how that price was fixed? What was your understanding as to how the price was fixed? Tell us.

A. That was the competitive price. That would be the price that anybody would have to get if they went to Automatic Canteen.

Q. Explain that. I don't get it.

A. In other words, if John Jones Company went over to Automatic Canteen they would have to bill them \$2.00 a hundred for their bars, or if Shotwell went, it would be \$2.00 a hundred.

In other words, it was our understanding that that was the price that we would have to quote them in order to get the business.

By Mr. Howrey:

Q. You were not present during any conversations held with Automatic Canteen Company, were you?

A. No, I was not.

Q. You never heard any conversations between Mr. Nason and Mr. Swanson, did you?

[fol. 99] A. I did not.

Q. You personally never had anything to do with negotiations between your company and Automatic Canteen Company?

A. Fixing the price, no, sir.

Q. Such knowledge that you may have had about how that price was determined came to you from sources other than your own negotiations, is that correct?

A. That is correct.

Q. And you don't know when those conversations took place that Mr. Nason spoke to you about?

Mr. Forkner: He has already testified that it was after June 19, 1936.

Trial Examiner Bayly: Very well, let him answer it.

The Witness: Beyond that I couldn't go, as to mentioning specific dates. However, it would be some time after that period. I would say, some time around the latter part of 1936 or the early part of 1937, when Mr. Nason came with us.

Q. Well, how can you say that someone in the Automatic Canteen Company told Mr. Nason what the price would be when they were already buying and selling, and that relationship had been established?

A. Mr. Nason had a very close acquaintanceship with Mr. Swanson, and it was on that basis that Mr. Nason was sent over to the Automatic Canteen; that with the hopes that, through his acquaintanceship with Mr. Swanson we could get a wider introduction of our line, a bigger volume of business than we had enjoyed up until that time.

Q. That didn't occur, did it?

A. I haven't the 1936 figures. I can't say. In 1937 it was \$16,000; in 1938 \$3,300.00; in 1939 it was \$2,700.00.

Q. That is a very small volume of business though, isn't it?

A. Yes. None of those were as large as 1937, as a matter of fact.

Q. You still want to testify here that someone in Automatic Canteen told Mr. Nason that the ~~price~~ was two cents a bar, and that that was the same price that other manufacturers would have to charge them when your price to

them had already been established and you were selling to them?

A. Yes. Surely.

[fol. 100] Q. What was the price prior to Mr. Nason's visit?

A. I can't answer that.

Q. You said that your understanding—maybe I misunderstood you. I understood you to say that Mr. Nason came back and told you that you would have to sell at 2 cents less, and that every other company would have to sell at that in order to get any business from Automatic Canteen.

A. That is right.

Q. What was your price prior to that?

A. I am saying that I don't have any records from 1936.

Q. If you remember that conversation with Mr. Nason, I think you would remember the price.

Trial Examiner Bayly: Mr. Howrey, let us be fair to the witness. He said repeatedly that he had no records from 1936. We have already ruled out any evidence here touching prior to 1936—not 1936—but prior to 1936.

Mr. Howrey: I am directing my question to subsequent to June 19, 1936, but prior to this exhibit.

Trial Examiner Bayly: That is all right.

Is there a question, Mr. Reporter, before the witness?

(The reporter read the question as follows:

"Q. If you remember that conversation with Mr. Nason, I think you would remember the price.")

By Mr. Howrey:

Q. Prior to Mr. Nason's coming back from his talk with Automatic Canteen.

Mr. Forkner: Is that in the form of a question?

Your Honor, I don't believe it is. If he can restate it so it is a question—

Trial Examiner Bayly: Would you mind restating that, Mr. Howrey? I don't believe the witness will understand that.

By Mr. Howrey:

Q. Can you explain why you can remember so distinctly conversations with Mr. Nason back in 1937, over five years ago, when you can't remember the price at which you were selling to Automatic Canteen Company at the same time?

A. Well, I didn't say I don't remember. I am saying that I am of the impression that the price in 1936 was the same price as it was in 1937, which is the point you are trying to make.

[fol. 101] Q. Yes.

A. By all I am saying is that I do not have the records to back that up.

Q. But you do believe that was the same?

A. I am of that opinion, yes.

CLARENCE O. MATHEIS was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Mr. Matheis, you are vice president and director of sales of the Walter H. Johnson Candy Company?

A. Yes.

Q. How long have you acted for the Johnson Candy Company in those capacities?

A. Well, in those particular capacities about six years. Prior to that, I was promotional sales manager.

By Mr. Forkner:

Q. Now, you had a conversation with Mr. Anderson, I believe?

A. That is right.

Q. From your knowledge, information, your contacts and correspondence with the respondent company, the Automatic Canteen Company of America, can you say that the respondent knew what price your 24-count candy sold for from 1936 on down to the beginning of 1942? You can answer yes or no.

A. Yes.

Mr. Howrey: I object, your Honor. I think the question should be limited to conversations, what was said.

Trial Examiner Bayly: The objection is overruled. The witness may answer.

Mr. Forkner: The witness has answered, haven't you?

The Witness: Yes.

By Mr. Forkner:

Q. Now, Mr. Matheis, will you tell us how you know that the Automatic Canteen Company or its officials knew the price at which you sold your 24-count candy, which was 64 cents during that period of time?

[fol. 102] A. Yes.

Q. Just tell the details of how you happened to know that.

A. As a matter of fact, it was general trade information to begin with, and I am certain that everyone in most every organization knew what the price of manufactured merchandise was. Specifically, however, in the case of Automatic Canteen Company I had correspondence with Mr. Boid on the subject of a concern in North Canton, Ohio, the Hoover Company. The company had registered a complaint, I believe, through the efforts of a jobber in that community who was trying to take the location away, I assume—

Mr. Howrey: Now, your Honor, I object to any further answer of that question. If a letter is available, that is the best evidence.

Trial Examiner Bayly: You may proceed. The objection is overruled.

By Mr. Forkner:

Q. Go ahead.

A. Well, the purport of the letter was Mr. Boid wrote me and asked me to write to the Hoover Company stating

whether or not the product we sold them was the same that we sold the jobber in that particular market. I did write the Hoover Company and, I believe, sent Mr. Boid a copy of the letter stating that the product we sold them was identical with that which we sold the jobber. Does that answer your question?

Q. Yes. You said the product which you sold to the jobber?

A. That is right.

Q. You stated that that was the 24-count that you sold?

A. Our price to the jobber of the 24-count was 64 cents delivered.

Trial Examiner Bayly: Now, Mr. Forkner, proceed:

By Mr. Forkner:

Q. Mr. Mattheis, do you know what factors, what items were taken into consideration by your company in making a price to the Automatic Canteen Company on this 100-count at \$2.03?

A. Certainly.

[fol. 193] Q. Will you just without giving detail as to the amount merely enumerate the items without giving any percentage?

A. The savings of freight, sales cost, carton cost, and general savings in packing.

Q. Now, Mr. Mattheis, were any of those items brought to the attention of the officials of your company or to your attention by any of the officials of the respondent, the Automatic Canteen Company of America?

A. Well, if they were, they weren't brought to my attention. Whether they were brought to the attention of Mr. Hallstrom who is since deceased, I can't answer that.

Q. Did you or your company ever attempt to sell to the Automatic Canteen Company the 24-count at sixty-four cents?

A. No, sir. That also might have been many years ago.

Q. Did you ever attempt to sell any of the distributors of the Automatic Canteen Company candy from June 19, 1936?

A. No, sir; we never tried to sell their distributors at all. We sold them directly.

Q. Why didn't you ever try to sell distributors of the Automatic Canteen Company?

A. We don't believe that it is good policy to sell a customer and then sell his customers.

ERNEST WALLIN was thereupon called as an adverse witness for the Commission and, having been first duly sworn, testified as follows:

Examination.

By Mr. Forkner:

Q. What is your name and address?

A. Ernest Wallin, Hammond, Indiana.

Q. How long have you been with the Queen Anne Candy Company?

A. Since September of 1929.

Q. What is your present position with the Queen Anne Candy Company?

A. I am the general accountant.

Q. And have you occupied a number of different capacities or positions with the Queen Anne Candy Company since September of 1929?

[fol. 104] A. Yes, it has been building up to the present position, in the same capacity.

Q. State whether or not you are familiar with the prices that other companies sold candy at in the 24-count during the same period of time?

A. Well, it is common knowledge that it was 64 cents and 68 cents, respectively in the proper years.

## Examination.

By Mr. Howrey:

Q. It was true, was it not, generally speaking that bars made for Automatic Canteen Company were made for them exclusively and sold to them exclusively at any given time, is that correct?

A. The majority of our bars were made absolutely for Automatic Canteen exclusively, and in reviewing this record we come across similar names.

Mr. Forkner: Your Honor, at this time I would like to call Ralph Boid adversely.

Trial Examiner Bayly: All right. Mr. Boid, take the stand.

RALPH BOID was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

## Direct examination.

By Mr. Forkner:

Q. Mr. Boid, were you subpoenaed to appear here at this hearing, being served by myself in the city of Chicago?

A. Yes, sir.

Q. Have you appeared in response to that subpoena here to testify?

A. I have.

Q. Give your full name and where you are presently staying in Chicago.

A. Ralph J. Boid, Webster Hotel, Chicago, Illinois.

[fol. 105] Q. What position did you occupy before you became a distributor for the Automatic Canteen Company of America?

A. Assistant secretary from 1937 to the last part of March, this year.

Q. To March of 1946?

A. That is right.

Q. Assistant secretary?

A. That is correct.

Q. Were you also vice president?

A. No, sir.

Q. Were you also a stockholder in the company during that period of time?

A. I was, up until 1945.

Q. You are no longer a stockholder?

A. No longer a stockholder.

Q. Did you occupy any position with the respondent prior to 1937?

A. I worked for the respondent from 1934, but without title.

\* \* \* \* \*

Q. Well, now, was it your official duty to secure the merchandise or see that it is available and to determine its terms and conditions? Was that part of your duties from '38 on?

A. That began to be my duties in '38, to see that there was a regular flow of merchandise of the right condition and type to our distributors.

Trial Examiner Bayly: In other words, you were the buyer, were you?

The Witness: No, sir, not at that time.

Mr. Forkner: Who was the buyer at that time?

A. Mr. Anderson.

Q. You assisted Mr. Anderson in those duties?

A. That is right.

Q. That was from what date on?

A. Well, really Mr. Anderson acted in capacity of buyer until 1941 or '42, early '42.

Q. I mean, when did that start?

A. Well, as assistant to Mr. Anderson I began to get into the problems in dealing with suppliers as early as 1938.

Q. Well, then you were familiar with the big problems of the respondent company from 1939 on except at the begin-

[fol. 106] ning you had a superior officer with whom you worked on, is that it?

A. All the time I was with the company I had a superior officer whom I reported to.

Q. I understand, yes. But I mean the man that you reported to was primarily responsible for buying.

A. That is correct.

Q. In the beginning?

A. That is correct.

Q. Now, later when you became the head of that department, what year was that?

A. I did not become head of that department, even down to 1946. That department is now headed by Mr. L. E. Leveron, after Mr. Anderson's death.

Q. Well, you were still a buyer, considered to be the buyer for the respondent company; weren't you?

A. Not in any terms that were ever used in our organization. Sure, I headed the product department which handled the problems for the distributors and did the merchandising for them.

Q. Who performed the function of securing merchandise then? Who was primarily responsible for that. In other words, who was the individual on the set-up?

A. Mr. Anderson who headed the department was responsible for it.

Q. Until his death?

A. Until his death. From then on Mr. L. E. Leveron was responsible for it.

Mr. Forkner: What was the last question and answer, please?

(The reporter read the question and answer as follows:

"Q. Until his death? A. Until his death. From then on Mr. L. E. Leveron was responsible for it.")

By Mr. Forkner:

Q. Well, now, Mr. Leveron was president, wasn't he, of the company?

A. Mr. Leveron is president of the company.

Q. He was out of town making speeches lots of times, wasn't he?

A. You have the Leverons mixed up.

Q. Oh, which Leveron is this?

A. L. E. Leveron.

Q. Who did you report to?

[fol. 107] A. Mr. Anderson up until the fall of 1942 and Mr. Leveron since that date, to the day I left.

Q. Who talked to the different companies that furnished candy, peanuts and gum after '38 down to '46?

A. I have had many discussions with the manufacturers that supplied us, but most of my discussions were in relation to service to, again, our customers.

Q. Now, in these discussions, in order to secure merchandise, price is an important factor, is it not?

A. Not with our organization.

Q. Prices of manufacturer, Mr. Boid.

A. Well, price is an important factor in the buying of anything.

Q. That is what I was getting at. Price is an important factor, isn't it?

A. It is an important factor.

Q. And naturally in securing merchandise, price would be a topic of conversation, wouldn't it?

A. No, sir, it would not.

Q. It would not?

A. That was not my experience.

Q. You mean that you bought without knowing what prices were?

A. Because we had asked the manufacturers to quote, so I knew what the prices were.

Q. You did have a lot of conversations with different suppliers, didn't you, in regard to terms, prices and conditions?

A. Of all the conversations held with manufacturers, in my presence or by myself, there was very little discussion with price, terms, conditions. The conditions, unless you classify conditions as the services and problems necessary to maintain a regular flow of goods to our distributors.

Q. All right, now, who had the responsibility then of seeing about that price? How was the price fixed then?

A. You have it in the exhibits here that show that semi annually, and it was true all the time that I was with the company. There were lines selected after asking the manu-

factors to submit the bars, sizes, weights, et cetera, and price, and after having examined those samples and made up our line—

Q. That was done twice a year?  
[fol. 108] A. Yes.

Q. Was that done all the time you were with the company?

A. Yes.

Q. Each year each manufacturer would make a couple of quotations?

A. No, sir, not necessarily. There are many manufacturers, Williamson is a good example, that had one bar. That bar stayed in the line from the time the original deal was made with Williamson, with no negotiations or changes.

Q. Did you still send out the letter twice a year asking them for quotations for the following few months?

~~A. Those letters were sent out regularly, about the 15th of March for the summer line, which is about a three or four-month line and by the 15th of July, or sometime in July for the fall line.~~

(The reporter read the question as follows:

“Q. What were those problems that you discussed with manufacturers?

“A. Primarily wrapping, keeping quality of bars,

“Q. Just a moment.”)

By Mr. Forkner:

Q. Was price a topic?

A. It might have been at times.

Q. When it was not, what was the topic?

A. Price was set by the manufacturer, and there was very little fluctuation in price from 1939 through until the war time.

Q. Then you did not—

A. And each season that manufacturers submitted their samples and their prices, that was the accepted price. The problem at the time the product committee was held was the line of bars that were going to be available for our customers.

Q. Was that not set also?

A. Price had nothing to do with it.

Q. Wait a minute. Was not the bar set?

A. The bars were set.

Q. All right. What was the problem then?

A. All right. In our educational program with our distributors, we took five cent bars and classified them into types. We had 12 different types of candy because of [fol. 109] these requirements of the machine, because the customer requirements—

Q. Just a moment.

A. We tried to fill in in selecting a line, the products committee did, a representative group of bars in each of those type for each of the seasons, year in and year out, and it made no difference to the products committee whether that bar came from Williamson, from Wrigley or from Queen Anne, as long as it fit the bill, fit into that scheme of merchandising. That was one of the biggest services to our distributors.

Q. Oh, yes. Now, it was important to know what the price would be on those bars, was it not?

A. Sure, we had them every period that the manufacturers were asked to quote.

Q. Was that not supplemented by discussions held with the different manufacturers and their representatives?

A. Very seldom.

Q. What do you mean by "seldom"?

A. Well, we had a case in the Curtiss case where there was some discussion on price, of which you have a record here.

Q. I thought you were the buyer of the firm?

A. No, I was never classified as the buyer of the firm, not by anybody in our organization.

Q. Then I thought your functions were securing the products?

A. A misnomer.

Q. Well, who would that person be if it was not you?

A. I have already reported, Mr. Anderson up until his death in 1942.

Q. You were assisting him?

A. Yes, and Mr. Leveron from 1942 until the day I left.

Q. In which you were assisting him?

A. Yes.

Q. In which you were in conferences mutually together?

A. Yes, many times.

Q. Now, tell us what you discussed at those times with the manufacturers? What was your discussion about in substance in buying a certain product?

A. All right.

Q. Give us a typical one.

A. All right.

[fol. 110] Q. Make it typical.

A. Take the Williamson case. Williamson Company, we had not bought merchandise from until sometime in 1939. In 1939 or somewhere along the way, Mr. Leveron and Mr. Williamson happened to meet and had some discussions. Following that meeting--

Q. Were you present at that meeting?

A. I was not—Mr. Leveron reported to me that he had some discussions and that I could expect a telephone call from Mr. Williamson, which I did, sometime later on, inviting me to have lunch with him at the Athlétique Club. Mr. Williamson said, "I believe we can get together on getting our candy in the Canteens." I said, "I see no reason why we should not." He wanted to know what were the requirements as every manufacturer did. First, we wanted to pack a 100 count.

Trial Examiner Bayly: We are not interested in these conditions, are we, except as to price? Are you not interested only in the negotiations on fixing the price? Let us try to see if we cannot keep on the track here.

The Witness: Your Honor, in buying that is very important, because that is what most of your negotiations are about.

Mr. Forkner: This man is trying to say price was never discussed at all in all this time. I will have to let him ramble a little in order to get down to the kernel here.

The Witness: Let us limit it then to price.

By Mr. Forkner:

Q. What?

A. Let us limit it to price.

Q. All right.

A. At the end of that conversation, at the end of that meeting, Mr. Williamson said, "I will have my accountants figure our cost under which the conditions you want it shipped and report to you," which he did and the bar went into the line after submitting these to the executives.

Q. What were the requirements of your company as to price which you would tell now and then to a manufacturer or a supplier before he ever started fixing his cost up and figuring his price?

A. In all my experience with Canteen I never heard a manufacturer told what the price would be that he had to sell it.

[fol. 111] Q. I am talking about what you told the manufacturer.

A. I never told the manufacturer. In all my experience with Canteen, nor did I ever hear it.

Q. Are you positive of that?

A. I am positive of that.

Q. Did you tell them at any time what they could buy—what you could buy from others and—

A. I did not.

Q. Did you tell them that your merchandising policy required that bars be purchased at two cents apiece or \$2 per hundred bars?

A. I did not.

Q. Who did.

A. Well, if anybody did, it was beyond my knowledge.

Q. Tell me why all your bars happened to be during that period of time, pretty close to \$2.02 a piece when all of them were selling at \$2.50 per hundred or 64 cents per 24 counts?

A. That is not the case during that period of time.

Q. What?

A. There was great price variation from 1936.

Q. What was the price variation from 1936 on?

A. From one manufacturer to the other?

Q. Well, you spoke about price variations, the same terminology, what was it?

A. What I mean is from one manufacturer to another there was great price variation.

Q. Yes, what was that price variation?

A. I would have to estimate it. I do not have the figures, but as much as 50 or 60 cents a hundred.

Q. All right. They would tell you they were selling the candy in 24 counts or 60 counts?

A. I knew that of general trade knowledge.

Q. You did. You knew the general trade knowledge, and you knew what the price of 24 count was, didn't you?

A. I knew the list price.

Q. What was it?

A. In the early years, 64 cents.

Q. What was it in 1942?

A. 1942?

Q. Yes, after the beginning of the war?

A. Most of them were getting 68 cents.

Q. You knew the price as which candy was being sold, did you not?

[Vol. 112] A. Only in so far as it was general knowledge in the trade.

Q. All right. You knew that when you discussed matters of terms and prices, with the different manufacturers, did you not, Mr. Boid?

A. I said nothing about discussing matters in terms of prices with manufacturers.

Trial Examiner Bayly: All right. Now, let us take this situation. Under your contract arrangement here, you had the right to reconsider and re-establish a price every six months?

The Witness: No, not every six months. It was for the summer lines and the fall lines, and it actually worked down to periods of about four months and about eight months.

Trial Examiner Bayly: What did you do in fixing that price?

The Witness: When it came to select a line, your Honor, notices were sent out to the manufacturers that had variable bars that they manufactured. In other words, they might discontinue the chocolate coated bar for the summer months

but bring in some other piece, and we would ask them to submit samples and prices and weights to our office for a meeting with this group of our junior and senior executives. At the particular time every year we had a meeting and went over these lines and went over the list of distributors, and then our dealings were with the manufacturers from that point on, where we have selected this bar or this bar or this bar, when will you be ready to ship?

Trial Examiner Bayly: Now, suppose a manufacturer had a bar that he wanted a little more money for?

The Witness: He showed that in his quotations.

Trial Examiner Bayly: If you felt it was too high you just dropped it?

The Witness: If we felt the bar was too high in fitting it into the picture, we just dropped it out and didn't list it.

Trial Examiner Bayly: You did not dicker with him?

The Witness: No, we did not.

\* \* \* \* \*

(The reporter read the record as follows:

"Q. Just how did you go about carrying out that primary duty of securing a good price or terms in dealing with these [fol. 113] suppliers? How did you go about it? What was your method? What was your procedure?

"A. I can't answer that question, Mr. Forkner.

"Q. Well, try it anyway. Make a valid attempt. You know the answer."

The Witness: I don't know as though I have said that was the primary duty.

By Mr. Forkner:

Q. The Examiner has ruled that you shall answer the question. So you will try to.

Mr. Howrey: If he can answer it.

The Witness: I can't answer that question.

By Mr. Forkner:

Q. What did you do then? What did you do in getting this merchandise? Just tell us.

A. I just told his Honor the steps that were taken regularly. That what you have there shows the formula. That there was never any notices regularly, never any consideration to price with candy manufacturers. There were some semi-annually, which was, a chance for the manufacturer to quote. There were no dealings. There was no question about either the bar, it went in or it didn't go in.

Q. Then, Mr. Boid, you did not need a high priced executive to take care of it? Just an office girl could send those notices out, couldn't she?

Mr. Howrey: I object, your Honor, as being an improper question.

Trial Examiner Bayly: I think that is proper. He said in his answers, or they sort of seemed to indicate there was not anything done.

Mr. Howrey: I do not think his answers indicate that. I think the answers have been fair and very honest.

Trial Examiner Bayly: We are not passing on that. We are passing on the facts of statements. He may answer. The objection is overruled.

The Witness: Well, as far as sending out the letters and securing the quotations for the next period to the manufacturers any office person could handle that. The important part of the job was the merchandising of the goods, having the lines and giving the right service to the distributors. That is the important function in the product department, all through the years.

[fol. 114] By Mr. Forkner:

Q. Getting the right kind of goods and from the right kind of manufacturers?

A. I didn't say getting. I said having.

Q. Having?

A. Having them available.

Q. Now, in that period of time we are talking about I believe you mentioned it was a buyer's market?

A. That is right.

Q. That is, 1936 to 1942 was a buyer's market?

A. Considered as such.

Q. There was not a limitation of goods, was there?

A. There was not.

Q. So you did not have such a problem in securing the merchandise?

A. Always had more submitted than we had any use for.

Q. Where was your problem?

A. The problem was having a diversified line of goods that fit in the canteen available to our distributors.

• \* \* \* \*

Q. When a manufacturer asked you if you could not increase your volume, what factors did you then discuss in regard to price; did price come under that discussion?

A. There was discussion about—

Q. If the price was reduced I suppose you would increase your volume?

A. It didn't have no bearing.

Q. No bearing?

A. No bearing.

Q. Price had no bearing at that time?

A. No.

Q. Of any particular manufacturer?

A. No.

Q. And price had no effect and made no difference, is that what you want to testify to here today?

A. Yes.

Q. Mr. Boid, is that what you want to testify to here today that price made no difference in the amount of candy that you buy from any particular supplier or manufacturer?

A. Price made no difference from any particular manufacturer on the approved line of bars that were listed for our distributors.

Q. No difference whatsoever?

[fol. 115] A. No difference whatsoever.

Q. And you want to stand on that testimony?

A. I will stand on that testimony.

• \* \* \* \*

Q. For instance, when you bought from Curtiss Candy the 100-count f.o.b. Chicago you wanted to be sure that was the same bar that somebody else was buying when they bought the 100-count at \$2.50 and the 24-count at sixty-four cents, is that the idea? In other words, you wanted to be

sure the weight was the same as the bar that was sold to the jobber at the jobbing prices?"")

Trial Examiner Bayly: The argument is all over. I am going to let the witness answer. He is a buyer here and intelligent, and I do not think anybody is going to get hurt by having it answered.

By Mr. Forkner:

Q. Let us have the answer, Mr. Boid.

A. One of the standard requirements from all suppliers was that they sell us the same weight bar, the same quality bar that they sold other outlets.

Q. Then weight was important to you as a buyer for the respondent?

A. As long as it related to the weight of the same manufacturer of the same bar that the manufacturer was producing.

Q. Now, my question is: Why did you want the same weight as the bar that was sold to the jobbers at the jobbing prices when your price was lower? Why did you want the same weight and quality as that sold to the jobbers at the jobbing prices?

A. In our business we had nothing to do with what was sold to the jobber other than in relation to the manufacturer's production on weight and quality of the bar.

Mr. Forkner: Will you read the question and I will ask the witness to answer it again, Mr. Reporter?

(The reporter read the question as follows:

"Q. Now, my question is: Why did you want the same weight as the bar that was sold to the jobbers at the jobbing prices when your price was lower? Why did you want the same weight and quality as that sold to the jobbers at the jobbing prices?"")

[fol. 116] The Witness: It made no difference to us where the manufacturer sold his goods. All we wanted was the standard weight and quality bar that he produced. He

could have sold it to anybody he wanted. He wanted the bar that was coming off the production line.

\* By Mr. Forkner:

Q. I agree that is what you wanted. Now I have asked you why.

A. That was the standard of our procedure.

Q. Why was it the standard of your procedure?

A. To give the customer the same weight and quality bar that could be bought from any other outlet.

Q. You did not buy at jobbing prices, did you?

A. No, sir, we did not.

Q. Were you aware of that when you were buying for that firm?

A. I don't understand the question.

Q. You said you were well aware that the 24-count sold at sixty-four cents before the war and at sixty-eight cents after the war.

A. I knew that only as a general trade price.

\* \* \* \* \*

Q. Is your chief duty that of purchasing products for the company?

A. It was never so classified.

Q. What do you mean by "classified"?

A. Well, I never heard it referred to in our organization.

Trial Examiner Bayly: What did you do, irrespective of the classification? What did you chiefly work at while you were with the respondent?

The Witness: Your Honor, that would be a hard question to answer. Much of my time was taken up in many ways. Research, insurance, and other assignments from the executive official whom I assisted.

\* By Mr. Forkner:

Q. Was your chief duty that of purchasing products?

A. I would say not.

Q. You would say that your chief duty was not that of purchasing products for resale?

A. That is right.

Q. Which might include confection products as well as other types of products?

A. That is correct.

[fol. 117] My duties, if you want to classify the time taken, were devoted a great deal more to other phases than purchasing products.

Trial Examiner Bayly: You did all the buying while you were with the respondent company, did you?

The Witness: I did not, sir.

By Mr. Forkner:

Q. You were head of the product or provision department, whose function was the securing of goods for the distributor to sell and getting goods to him in the best possible way?

A. I do not think that is the proper classification. I reported consistently to someone who headed the product department. I was the assistant.

Q. But you were head of that department, weren't you?

A. No, I was not head of that department.

Q. Weren't you the head of that department, the same as Mr. Schaeft was the head of the traffic department?

A. I think we are playing on terms, when you try to answer that.

Q. You were the head of that department; that is, the product department that secured the goods.

A. As far as that distributing organization was concerned, their correspondence, their problems and deals were all referred to me as the product department. As far as the manufacturers were concerned there appears to be a misnomer on that. Sure I had lots of dealings with manufacturers in relation to the providing and securing the flow of goods to our distributors.

Q. State whether or not you were head of the product department whose duty was to secure goods for the distributor.

A. I said, the product department was headed by Mr. Anderson, during my early days, and headed by Mr. Leverone during my later days.

Q. You had charge, though of securing the candy and the prices at which candy was bought, did you not?

A. I had charge of seeing that the flow of candy was constant and of the right type and quality to our distributors.

Q. Just answer the question. Did you have charge of securing candy and the price at which it was bought?

A. I had charge of seeing that the flow of candy available to our distributors on order was before them. Our [fol. 118] lists were properly prepared and they were properly notified and properly instructed.

Q. I am not referring to the distributors. I am referring to the securing of candy. Did you have charge of securing the candy from the manufacturers, the gum and peanuts from the suppliers?

A. In the work, as the assistant to an executive of the firm, it became my function to ask the manufacturers to submit from time to time goods which a committee would select and which goods would then go into lists which I prepared for our distributors.

Q: Now, Mr. Boid, you have answered these questions according to your best knowledge and information?

A. That is correct.

Q. And you have understood the questions before giving the answers?

A. I think so.

Q. Now, do you recall that you were examined on October 27, 1944, at Chicago, Illinois, before a Trial Examiner of the Federal Trade Commission, Docket No. 4556, in the matter of the Curtis Candy Company?

A. I recall such examination.

Q. Do you recall being asked the following questions and giving the following answers at that time—

Mr. Howrey: If your Honor please, what was the date?

Mr. Forkner: October 27, 1944. Just read the question back and you will have all the information on that.

Trial Examiner Bayly: Read it.

(The reporter read the record as follows:

"Q. Now, do you recall that you were examined on October 27, 1944, at Chicago, Illinois, before a Trial Examiner of the Federal Trade Commission, Docket No. 4556, in the matter of the Curtiss Candy Company?

"A. I recall such examination.

"Q. Do you recall being asked the following questions and giving the following answers at that time——")

By Mr. Forkner:

Q. (Continuing.) —at Record Page 1411:

"Q. What are your particular duties as assistant secretary, Mr. Boid?

"A. My chief duty is that of purchasing products.  
[fol. 119] "Q. Purchasing what?

"A. Products; items for resale. That covers not only confectionary but others."

Do you remember being asked those questions and giving those answers at that time? Just, do you remember?

A. I don't particularly remember what the questions and answers were. My memory doesn't serve me that well.

Mr. Forkner: I would like, your Honor, to have the last question put to the witness read back to him.

Trial Examiner Bayly: Read it.

(The reporter read the question as follows:

"Q. Is this statement true, which is given in answer to this question? I want you to answer it:

"Q. What are your particular duties as assistant secretary, Mr. Boid?

"A. My chief duty is that of purchasing products.

"Q. Purchasing what?

"A. Products; items for resale. That covers not only confectionary but others."

"Now, Mr. Boid, tell me whether or not that statement is true and correct.")

By Mr. Forkner:

Q. State whether that is true, Mr. Boid.

A. Well, that was part of my duties.

Q. I said, state whether the statements just read to you are true or incorrect? That is a very simple question.

A. It is not complete.

Q. Is it true?

A. It is not complete.

Q. State whether or not your chief duty was that of purchasing products.

A. It was not.

Q. Then, I take it, your former statement was incorrect?

A. Only partially.

Q. Your answer before was this:

"My chief duty is that of purchasing products."

Is that statement true, Mr. Boid, or not?

Answer that yes or no, and no quibbling.

A. That depends upon the qualification of the term "purchasing products".

[fol. 120] By Mr. Forkner:

Q. What was your chief duty?

A. That varied from time to time.

Q. Mr. Boid, do you have any explanation to make why, when you were asked a question on October 27, 1944, in Docket No. 4556, under oath, you gave that answer at that time and you gave these answers now? Do you have an explanation?

A. I am not an experienced witness. In fact, that was the first time I was ever on the stand. I was sent over here on specific assignment from my superior to appear on behalf of whatever was involved between Automatic Canteen Company and Curtiss, and to answer to the best of my ability. I was provided with the figures and volumes, and things brought out here.

Q. Will you explain why you answered at that time that your chief duty was that of purchasing products, and you

named at that time confectionary products, and now, today, you list—and yesterday—a long list of duties; and when I ask you whether that was your chief duty you evade the answer. Would you explain that?

Mr. Howrey: If your Honor please, I move that counsel's remark ~~by~~ stricken. There has been no attempt by this witness to evade any answer. He has answered to the best of his ability.

Trial Examiner Bayly: Can you answer that?

The Witness: Your Honor, I don't recall. I don't know why my duties on that—

Trial Examiner Bayly: You said, "On a specific assignment" you did some purchasing, is that right?

The Witness: That is correct.

Trial Examiner Bayly: Now, in purchasing, did you dicker a little on price and the amount?

The Witness: Your Honor, I would like very much to explain the regular step that was taken.

Trial Examiner Bayly: Now, what I want to know is this: You had a special assignment to buy candy. Did you dicker with the manufacturer-seller as to quantity when you bought, the price you were going to pay for it, the terms of payment and those things?

The Witness: Your Honor, all those conditions in relation to the possibility of that deal, yes, were discussed at the meeting and reported back to my superior.

[fol. 121] Trial Examiner Bayly: Now, take it up from there. That is what we want to know about it, the dicking.

Mr. Forkner: Yes.

By Mr. Forkner:

Q. Did you have negotiations with these different manufacturers or a number of manufacturers or suppliers of products?

A. Only such negotiations with manufacturers as those that had not previously been made before my time.

Q. And among those negotiations or in those negotiations, was the price discussed?

A. It may have been.

Q. Now, those prices which were not set prior to the time you came to the company—did you have charge of securing the candy and prices at which it was bought?

A. On special assignments, I negotiated deals with new suppliers and reported back to my superiors.

Q. Now, did you accept or reject these offers that were made?

A. I did not.

Q. Were most of these offers in written or verbal form?

A. Both ways.

Q. Well, in the majority of the cases, which would you say?

A. In the majority of the cases they were verbal.

Q. Now, is that true in your dealings with the Curtiss Candy Company?

A. The Curtiss Candy Company had been selling Canteen ten years before I entered into any negotiations on them on special assignment.

Q. Now, the question is, Mr. Boid, whether or not in the majority of the cases the offers of the negotiations to Curtiss Candy Company was in verbal or written form.

A. That I would not know, before my time, but after my time there were very few negotiations. There might have been a case here and there where certain problems or conditions came up.

Q. Did you make any decisions as to whether or not these offers made by these manufacturers or suppliers should be rejected or accepted?

[fol. 122] A. I did not.

Q. Mr. Boid, do you recall being examined in the matter of the Curtiss Candy Company, Docket No. 4556, on October 27, 1944?

A. I do.

Q. Do you recall being asked this question and giving this answer at that time—

Mr. Howrey: What date was that, Mr. Forkner?

Mr. Forkner: October 27, 1944.

By Mr. Forkner:

Q. (Continuing.) ——starting at the top of Page Record 1419:

"The Witness: These prices were the result of prices submitted at the time when we have a change in line of bars from summer to winter lines.

"By Mr. Forkner:

"Q. Would you explain that?

"A. Twice a year we send out written requests to all candy manufacturers to submit lines, prices, weights, types, and twice a year we select a line which can be used either during the summer months or during the fall months, and these prices that you see here are the prices submitted by the company at the time we call for these lines. Those variables that you have represent the conditions at the times these lines were submitted.

"Q. Those changes were the result of submission of prices to you during 1937 to 1942 by the Curtiss Candy Company?

"A. That is correct.

"Q. Is that done in written form or verbal form?

"A. In most cases, it is written form.

"Q. You accept or reject those offers as made?

"A. That is right."

Now, Mr. Boid, do you recall being asked those questions and giving those answers——

A. I don't recall.

Q. (Continuing.) ——on October 27, 1944, after being sworn under oath?

A. I don't recall the questions.

Q. Oh, you don't recall?

A. No.

Q. Now, state whether or not the answers made to those questions are true or incorrect:

[fol. 122] A. What was the last answer there, Mr. Forkner?

Q. "Q. You accept or reject those offers as made?"

"A. That is right."

A. That is correct.

In answering that, the only thing I failed to put in was "We accept or reject."

Q. The little word "we" has got a lot of meaning to it, hasn't it?

A. Yes, sir.

Q. Now, when I asked you a few moments ago the same question and you said that at no time did you reject or accept an order, that that was done by others, how do you reconcile that with your former testimony as of October 27, 1944, on that point?

A. I don't see that that has any bearing on it.

Q. How do you reconcile it?

A. I said in that answer probably, as an inexperienced witness, I failed to put in the word "we". I was speaking for the company, the Automatic Canteen Company.

Q. Then, that statement was incorrect?

A. I didn't say "I" in that answer.

Q. The question was;

"Q. You accept or reject those offers as made?"

"A. That is right."

You claim you were inexperienced at that time and answered incorrectly, is that true?

A. We are playing on words.

Mr. Forkner: Continuing without any questions or answers in between what I have just quoted on the same page, at Record 1418:

"Q. You will note a number of changes. Would you be taking care of changes in those prices?"

"A. That is right."

Then, at Record 1419:

"Q. You accept or reject those offers as made?"

"A. That is right."

Then, at Record 1415:

"Q. Who is the head of that department?"

"A. I am the head of the products department and Mr. Schaeft heads the traffic department.

"Q. The products department. Does that include candy?

"A. That includes candy."

[fol. 124] By Mr. Forkner:

Q. Further, do you remember yesterday being asked these questions and giving these answers?

"Q. I thought you were the buyer of the firm?

"A. No, I was never classified as the buyer of the firm, not by anybody in our organization.

"Q. Then I thought your functions were securing the products?

"A. A misnomer.

"Q. Well, who would that person be if it was not you?

"A. I have already reported, Mr. Anderson up until his death in 1942.

"Q. You were assisting him?

"A. Yes; and Mr. Leverone from 1942 until the day I left.

"Q. In which you were assisting him?

"A. Yes."

Q. Do you recall being asked those questions and giving those answers yesterday under oath?

A. I do.

Q. Now, how do you reconcile that with your former statement at record 1415, in Docket No. 4556, of October 27, 1944, in which you state that you are head of the products division and that you are the one who secures the products?

A. As an inexperienced witness I failed to catch the meaning of the terms in the question because there were no changes under the conditions at that time from the time I was with the company. I reported I worked direct as assistant to a superior and I reported to them.

Q. Then you want us to believe your testimony of yesterday and today rather than your testimony of October 27, 1944?

A. If that is the Court's decision.

(The reporter read the question as follows:

"Q. Now, when you bought candy bars before the war, your arrangements were being made for the respondent on candy, gum and peanuts, which was being resold to the distributors, is that right?"

The Witness: When my company bought products from the manufacturers.

[fol. 125] By Mr. Forkner:

Q. You were doing the leg work, I suppose, or the negotiating for the purchases of candy, gum and peanuts?

A. Not necessarily. In specific cases where I was assigned for the respondent—

Trial Examiner Bayly: Let us cut out playing hide and seek.

We are only talking about the situations where you were carrying the ball, where you were dickering for the purchase of candy.

The Witness: Your Honor, to answer that there it would have to be specific manufacturers.

Trial Examiner Bayly: Tell us about them.

The Witness: Williamson Candy Company—

Mr. Forkner: Just a moment.

By Mr. Forkner:

Q. Tell me how many of these companies here listed, on Commission's Exhibit 65, you had any negotiations with, either by letter, telegram or in person.

A. May I see the list?

Q. Yes.

A. You want them named as I go through this?

Q. Yes; and name the individuals to whom you talked or wrote to or telegraphed or telephoned?

A. In answering that question, I have no records before me, and I have to call on my memory entirely as to whether there were negotiations or no negotiations with these manufacturers. But I will be very happy to furnish the list or give the list of those with whom I had dealings in some form or the other.

It may have been entirely on the service of the company, Fred W. Amend Company.

Q. Who did you deal with there?

A. Mr. Fred W. Amend and Wallace Shape.

Q. The next one?

A. Paul F. Beich Company.

Q. Read the exhibit number, if you will, please, when you are answering.

A. 65-19 is the first one, and 65-30.

May I ask, is this number in the right-hand corner the one, or the number following it?

Q. The one on the left, 65-30.

A. That should be changed, then. Amend is 65-2, is that correct?

[fol. 126] Q. Yes, that is 65-2.

A. Beich is 65-3; Bon Candies, 65-4.

Q. Whom did you talk to in Bon?

A. Ed Long and George Payne.

Q. Where did you talk to them?

A. At our office.

Q. On how many occasions?

A. Probably on two or three.

Q. What was the substance of the conversation?

A. I do not remember that.

Q. State whether or not you discussed price with them.

A. Price was not discussed with them.

Q. What was discussed, then?

A. The question of whether our company would bail them out of receivership.

Q. How about the sale of candy in 1942, there (indicating)? What discussion preceded the sale of those 3,594,182 bars of candy?

A. All right. After negotiations with these two gentlemen in Mr. Anderson's office and legal counsel, there was some money loaned this company to put them back into business. That was in the year of 1942. As a result of that transaction, our company received from them the amount of bars shown in this exhibit.

Q. All right. Next?

A. Bradas and Gheens, 65-6.

Q. Now, wait a minute. As to those, who did you talk to there?

A. I don't remember.

Q. Where did you talk to him?

A. As I recall it, it was at a candy convention in New York or in Chicago.

Q. Did you discuss price or terms with them?

A. We did not.

Q. What did you discuss?

A. Whether they would have bars available for shipment. Whether they were ready to reenter as a supplier for the Automatic Canteen Company.

Q. Had they sold to you before?

A. They had sold prior to 1939.

Q. Now, how did you determine the price?

A. The manufacturer quoted the price.

Q. Did he quote it to you in this conversation?

A. No, sir; at a later date.

[fol. 127] Q. And you didn't discuss price or terms with him at that time?

A. I did not.

Q. How long did you talk to him?

A. I can't answer that.

Q. About? Just give us an estimate.

A. I haven't the least idea.

Q. You are pretty positive you didn't discuss price, but you don't know how long you talked to him?

A. No. My problem at that time was whether they were ready to begin resupplying Automatic Canteen.

Q. That was quite a problem, was it?

A. Yes.

Q. You could have found out by just talking to him over the telephone?

A. That is possible.

Q. How long did you have that conference?

A. I don't remember. I told you my memory does not serve me that well. Maybe it was over the dinner-table.

Q. Or a glass of beer?

A. It might have been.

Q. All right.

Take the next one up.

A. Bunte Brothers, 65-8.

Q. Whom did you deal with there?

A. Mr. Ed Klein.

Q. How many conversations did you have with Mr. Ed Klein?

A. I would guess over the years I have been with the Canteen, a great many.

Q. During those particular years there, 1939 to 1942, shown on Commission's Exhibit 65-8, what conversations did you have with Mr. Klein?

A. Any conversations I had with Mr. Klein were entirely in respect to the bars they would have available and the services that they would render.

Q. What services are you talking about when you talk about "services"?

A. I am talking about the service of packing, shipping and routing of goods to our distributors.

Q. Was that such a problem?

A. The Bunte Brothers Company had furnished Automatic Canteen Company for seven, eight, nine years before this date.

[fol. 128] Q. Just a moment. Did you have anything to do with the routing of candy? Didn't you have a traffic department that took care of that? Wasn't there a Mr. Sebaet who was head of that?

A. In many cases.

Q. Where were you discussing that with him?

A. It fell to my lot to settle any differences between the routing requested by the distributors or on the order and that which the Traffic department thought best.

Q. Was there a dispute between the traffic department and Bunte Brothers?

A. I couldn't tell you.

Q. Didn't you just get through stating that you had a discussion on that with him?

A. No. I said I had a discussion on services with our distributors. It might have included any number of products.

Q. Might have? What did the conversation include on that subject?

A. My memory is not that good, Mr. Forkner.

Q. You don't know?

A. I don't know.

Q. Do you know whether you discussed price?

A. I am certain of that because Bunte had been selling

the company and they quoted regularly before our product committee.

Q. Take up the next one.

A. All right. Chase Candy Company, 65-10.

Q. Whom did you talk to there?

A. Mr. Charley Chase.

Q. When did you talk to him?

A. I talked to Mr. Chase a great many times during the years.

Q. Well, take up your first conversation that you can recall.

A. I don't even recall the first conversation with him. I don't remember when it took place.

Q. Well, what did you discuss with him?

A. Services to our company.

Q. Services?

A. The bars they were going to have available, the size, the wrapper, the types, and how they were going to pack them.

Q. And price?

A. I may have discussed price with him.

[fol. 129] Q. What did you say about price?

A. Again my memory doesn't serve me that well. I don't remember what was discussed at these individual meetings.

Q. State whether or not you didn't tell him that you thought you should have a lower price—that the company should have a lower price.

A. That is very easily answered, Mr. Forther. I never told any manufacturer that.

Q. State whether or not you didn't tell him that you should have a lower price because of certain savings that could be made resulting from elimination of salesmen's commissions, the elimination of freight, the elimination of no returns for soiled and stale goods, the advertising value and the distribution that Automatic Canteen Company would afford to him as a manufacturer of five cent candy bars. Then, state whether or not you mentioned any or all of those factors, and if so, what ones.

A. I have already answered that I do not remember the conversations. It is perfectly possible that the fact that we shipped all our bars F.O.B. manufacturers' plants,

was discussed with him. I don't know when this deal was made—I mean—when the original terms or conditions under which we had to have candy shipped were made by this company. Those things were all discussed at the time the original deal was made.

Q. Just a moment, Mr. Boyd. I didn't ask you whether they were discussed. I asked you whether or not you stated those things to him.

A. I have no way of knowing.

Q. Might you not have discussed that with him?

A. I don't think so.

Q. If you do not remember, Mr. Boyd, how can you be so positive that you did not discuss those different things?

A. Mr. Forkner, we were very careful—

Q. How is that?

A. I don't remember the conversation with Clark.

Trial Examiner Bayly: Let us get down to this. Are you saying here, as a final report on your testimony as the buyer for the respondent company, that during all the times you were negotiating for the respondent that you never discussed price with the manufacturer-seller?

The Witness: No, your Honor, I am not saying that.

Trial Examiner Bayly: Did you ever discuss price?

{fol. 130} The Witness: That is perfectly possible at any of these meetings that might have taken place during the years. It is perfectly possible.

Trial Examiner Bayly: That is the object of this examination. If you can tell Mr. Forkner that we will save a lot of time here.

The Witness: What I am trying to say on this, your Honor, is that with many of these companies the original negotiations—

Trial Examiner Bayly: I know all about that. The manufacturer-seller had the right to reconsider the price structure twice a year, you told me—in the summer, a four months period, and for the winter.

The Witness: That is correct.

Trial Examiner Bayly: We have got testimony in here that once in a while the manufacturers got a sharp increase

in the raw materials. Everybody knows that they had violent increases in the cost of labor.

Are you saying on those occasions, and notwithstanding this testimony, that these manufacturer-sellers never even discussed the question of price with you when you undertook to dicker with them?

The Witness: No, I am not saying that, your Honor. At such times when those things occurred there may have been discussions with those manufacturers, either with Mr. Anderson, Mr. Swanson, Mr. Leverone or myself from our organization. On the other hand, those price changes came from those semi-annual requests where a manufacturer had to have the option to change his price and have to quote any price he wanted.

Trial Examiner Bayly: Then you are saying that this proposed seller, who is manufacturer, if he had several reasons for changing his price structure, that all he would have to do was just write you a letter or send it in in the form of a proposed new price and you would take it or leave it. Is that all there was to it?

The Witness: There might have been associations beyond that. We have one case here, Curtiss Candy case. And in many cases there was no discussion. The bars were accepted and nothing said about the price. We just changed that in the billing price.

Trial Examiner Bayly: Now, you talked about a buyers market. I understand that a buyers market is when the buyer is king of the walk; that there is more stuff to sell than there are buyers.

[fol. 131] Did you just fix the price and send out the price lists, and when these boys wanted to hop on they bought it or they didn't play ball with you? Did you ever do that?

The Witness: No, we never did that.

Trial Examiner Bayly: I frankly don't know what they did do.

If anybody else does, I would be glad to have them inform me.

Mr. Howrey: You had fifteen manufacturers on the stand who testified on how these prices were fixed.

Mr. Forkner: We will get to that in a moment.

Mr. Howrey: To me it is quite clear how they conducted their negotiations.

By Mr. Forkner:

Q. Now, Mr. Boid, you had numerous conferences with D. L. Clark Company you said all over the country and at your offices. State whether or not you didn't mention some savings that they could save?

A. That wasn't quite the statement I made. I had many meetings with D. L. Clark but those meetings, in most cases, were purely—I don't like to label them social—but they were meetings where we exchanged greetings, "How is everything going?"

Q. You talked about the weather?

A. I said maybe at those meetings there were discussions about raw material costs and the fact that they might have to make changes in their price when it came down to the next period.

Henry A. VAN GESTEL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Kern:

Q. State your name for the record.

A. My name is Henry A. Van Gestel.

Q. And where do you live, Mr. Van Gestel?

A. I live in Brookline, Massachusetts.

Q. What is your business, sir?

[fol. 132] A. I am connected at the Walter Baker Division of the General Foods Corporation.

Q. Where is that plant located?

A. That is in Dorchester, Massachusetts.

Q. What official capacity do you have in that business?

A. I am sales manager of the confectionery division of the company.

Q. How long have you been with the company?

A. Since June of 1944.

Q. And have you acted in the capacity of confectionery sales manager during all of that period?

A. Yes.

Q. Have you sold merchandise to the respondent, Automatic Canteen Company of America?

A. No, not within my experience. We have been selling to distributors, so-called, of the Automatic Canteen Company of America.

Q. Now, did you have any conversations with representatives of the respondent, Automatic Canteen Company, during any time that you have been connected with the company?

A. Yes.

Q. With whom?

A. Well, I have met a number of the people of Automatic Canteen Company. I cannot recall all of their names, but I remember particularly talking with Mr. Boid and Mr. Skoaglund.

Q. Did you talk to them both at the same time or separately?

A. Both at the same time.

Q. Where and when did that conversation take place, to the best of your recollection?

A. I would say about a year and a half ago, and it took place in my office at Dorchester.

(The reporter read the question as follows:

"Question: Will you state the substance of that conversation to the best of your recollection?"

The Witness: Well, principally, the two gentlemen that visited me at the time came to see me in the interest of securing merchandise from us for their distributors. Mr. Skoaglund, particularly, emphasized the resources of the [fol. 133] Automatic Canteen Company and its aggressive

policy of developing its business, the class of institutions where their machines are in operation, with the intent to impress us with the desirability of their company as an account of our house:

By Mr. Kern:

Q. Was there anything said by either Mr. Boid or Mr. Skoaglund relative to the price desired by the respondent?

The Witness: May I ask a question there?

Trial Examiner Bayly: The question is these gentlemen were there discussing matters with you. Did you discuss price, delivery, terms and conditions?

The Witness: The question is whether it deals with the present or the future.

Trial Examiner Bayly: Go ahead.

By Mr. Kern:

Q. Did Mr. Boid discuss anything relative to the present prices of the product?

A. No. He was entirely agreeable to pay the list price which we offered.

Q. Was he familiar with the price at the time he called, or was he apprised of that by you?

A. I am sure that I apprised him of it, and I believe he would have been familiar with it, because we are competitors.

Q. As a matter of fact, the general level of prices is a matter of common knowledge in the trade, is it not?

A. Yes.

Read the question, My Reporter.

(The record was read by the reporter as follows:

"Question: Did Mr. Boid make any reference to any future prices which he expected to receive of the company?"

"Answer: Yes sir."

"Question: And what was the substance of those references?"

The Witness: Mr. Boid made the statement to me that our list price at the present time would be satisfactory, but that the Automatic Canteen Company would, of course, assume later on when there is a free movement of merchandise, that the Automatic Canteen Company would be regarded by our house as a house account.

My reply to that was that all of our customers were house accounts, and Mr. Boid said specifically what he had reference to was the matter of a commission to our salesmen, and that in view of the fact that the negotiations would be made directly with the principals of the Automatic Canteen Company and my office there would be no occasion or necessity for us to pay a commission to our representatives, and that therefore the Automatic Canteen Company would expect to receive a discount of 5 per cent on merchandise which they purchased from us.

By Mr. Kerr:

Q. Did he express satisfaction with the amount of merchandise previously shipped or not, or was his effort to obtain a greater volume of merchandise at this time?

A. His effort was to obtain a greater volume of merchandise. I am sure he was not at all satisfied with what we were shipping, and that was pretty generally true.

The Witness: I am afraid that my reply to Mr. Boid precluded very much more conversation relative to price, inasmuch as I explained to him at that time that we had but one price to all of our customers. The principal matter relative to a special price was pretty much limited to the matter of a 5 per cent discount, instead of a 5 per cent commission to our representative.

Q. Did Mr. Boid indicate to you the capacity in which he was appearing for the respondent, Automatic Canteen Company, in your office?

A. Yes, as buyer for the company.

[fol. 135]

## Proceedings

Trial Examiner Bayly: The further hearing is resumed in the matter of Automatic Canteen Company of America, a corporation, Docket No. 4933, on Saturday morning, October 19, 1946, at 9:00 a. m., Central Standard Time.

Are you ready, gentlemen, with a witness?

Mr. Kern: Yes, we are, your Honor. Will you take the stand, Mr. Mann?

WALTER H. MANN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kern:

Q. State your name to the court.

A. Walter H. Mann.

Q. Where do you live, sir?

A. Hotel Pierre, New York City.

Q. And your business location?

A. 41 East 42nd Street, New York City.

Q. And what business are you in, sir?

A. I am the president of the Wilbur-Suchard Chocolate Company, Inc.

Q. That company manufactures what product?

A. It manufactures cocoa and chocolate products of the kind generally manufactured by chocolate factories.

Q. What do you manufacture? A five-cent bar?

A. Yes, we do.

Q. And what types of bars manufactured by what companies are most closely competitive?

A. The five-cent bars manufactured known under the Hershey brand, and Nestle brand, are the most competitive.

Q. What classes of customers does your company sell?

A. We sell all classes of customers, wholesalers—I should say all classes, except retailers, we do not sell the small retailer. We sell wholesale, chain stores, manufacturers of candy, theater confections, vending machine operators. We sell every class of customer who is customarily sold by the industry.

[fol. 136] Q. During the period since 1936 have you sold the respondent, Automatic Canteen Company?

A. We have sold them at various times since 1936, not every year, but at various times.

Q. You are the president of the Wilbur-Suchard Company, is that correct?

A. I am.

Q. How long have you served in that capacity?

A. I believe sometime in the year 1935, or early 1936, and since.

Q. And were you with the company before that?

A. I have been with the company since the fall of 1934.

Q. Do you recall the names of the representatives of the respondent who called on you?

A. I recall having talked with Messrs. Anderson and Boid before 1940 and Mr. Swanson after 1940.

Q. Did Mr. Boid indicate to you what position he held with the respondent company, and what his duties were?

A. Yes. He indicated he acted and discharged the duties, as far as I could see, as head of the purchasing.

Q. As a buyer for the company?

A. Yes, head buyer for the company.

Q. Did he say that he was the head of the purchasing department of the respondent?

A. Certainly—he either stated so, or I knew it, because there was no question in mind that he was.

Q. Did he display familiarity with the general level of prices in the industry?

A. Yes.

Q. State whether or not such prices, generally, current level prices in the industry are a matter of common knowledge and are known to any buyers who buy substantial amounts of candy?

A. You mean whether the general price level of a candy manufacturer or chocolate manufacturer is generally known to buyers such as Mr. Boyd?

Q. Yes.

A. I would think so.

Q. Now I will ask you to state the substance of the con-

versations that you had with these gentlemen and the general scope of such conversations.

Trial Examiner Bayly: Now, let us limit it to Mr. Boyd, if you don't mind, first.

[fol. 137] By Mr. Kern:

Q. Concerning the situation with Mr. Boid.

A. This will have to be a substance of the conversations, because it would be hard to identify one against the other.

Trial Examiner Bayly: All right. I understand.

The Witness: We are a small manufacturer, and before 1940 had very little public acceptance or demand for our brand.

Trial Examiner Bayly: You wanted to sell and he wanted to buy?

The Witness: We tried to sell everybody, and among the people we tried to sell was Mr. Boid. We wanted to find out how they bought and tried to find out substantially what prices they paid others. We went there with that knowledge, prepared to talk to him about buying our product, to the extent their prices were talked about back and forth between them. Whether we offered a price first--whether they offered a buying price first or we offered a selling price first, the fact was established that if we were going to sell the company we would need to sell them at a lower price than similar goods under better known brands were sold. The fact was established by a statement on his part, directly or implied; that we could not expect to sell for as good a price as competitive bars that were more in demand would sell for, or that we could sell if we were selling to some other class of customers.

By Mr. Kern:

Q. What particular reasons did Mr. Boid state relative to desiring a better price and expecting a better price? Did he refer to any specific savings by reason of the methods his company used in doing business?

A. He pointed out the usual savings which they state they are able to make with manufacturers, such as packag-

ing, or if they were buying f. o. b. what would be a saving, or the volume of their purchases would effect a savings in sales representatives, and, of course, he pointed out the advantages they could give to a manufacturer by way of selling his product to a great many people and giving it wide distribution.

Q. What was the general level of prices in the industry prior to 1942?

[fol. 138] A. Well, in this period covered I believe there were two prices. I believe that in the early part of 1936, 1937, or 1938, sometime in there, the standard price of 24-count boxes of candy must have been 64 cents, and at some time in the latter part it must have been raised to 68 cents, it was 1936, or 1940, thereabouts.

Q. Do you know the approximate date when it went up?

A. I really do not know, sir, but my recollection would be maybe it went up in 1939 or 1940, from 64 cents to 68 cents.

Q. Did Mr. Boid indicate specifically the price which his company desired?

A. Well, our conversations with Mr. Boid, as I would recall it now, were at a time when the price was 64 cents. I don't think that a price of 64 cents probably was mentioned, because they were interested in buying a different kind of package, and they may have figured on a relative basis of 64 cents, but certainly that was not discussed as a possible price or anything to do with the price at which they were buying.

Q. And you previously testified, I believe, that that was known by Mr. Boid?

A. I think anybody ought to know that price.

Mr. Howrey: I object to this witness testifying as to what Mr. Boid knew. I don't think he could search his mind.

Trial Examiner Bayly: That is correct. You cannot detect a mind, what is in the mind, by a statement.

The Witness: That's why I said I thought everybody ought to know the price.

Trial Examiner Bayly: If you don't mind will you wait a minute until I get through. I reserve the right to finish my sentence.

Mr. Reporter: Will you read as far as I have gone?

(The record was read by the reporter as follows:

"Trial Examiner Bayly: That is correct. You cannot detect a mind, what is in the mind, by a statement—")

Trial Examiner Bayly: (Continuing)—If this witness from statements made in the process of negotiating or dickering, as I call it, for price revealed his knowledge of the price it would be competent, otherwise it would not be. Now let the witness take it up—strike what he has said and let him go on from there. We are having one talk at a time in these hearings only.

[fol. 139] Mr. Forkner: May I make this statement, your Honor, in the record, that it is our position that the matter of price in the industry was so well known by all buyers and by all of those in the industry that evidence to that effect is competent on the theory that no buyer could be buying goods without knowing the prices, and therefore questions which may be directed along that line, we feel, are competent to reveal that in the record. Of course, I recognize that the other proof is more desirable, but there is other proof of the other type that we feel is competent also.

Trial Examiner Bayly: There isn't any question about it. The buyer for a large concern who, as this record shows, bought several million dollars worth of goods, and was paid, obviously, a salary in accordance with the duties and responsibilities, and if he did not know the price of candy he was getting his money under false pretenses, so we won't spend much time on that. Proceed.

By Mr. Kern:

Q. Was any specific price requested by Mr. Boid?

A. My recollection is that a price was mentioned. I have to say on the basis that we were talking price back and forth, and I could not say what price we mentioned.

Q. Was any reference made to prices which they obtained from your competitor, the Hershey Chocolate Company?

A. I do not recall that a specific price was mentioned in dollars and cents. It was stated in a conversation about their price that obviously our brand having a less demand, and in fact a negligible demand at the time, it was worth

less because of that reason, and in discussing our price we understood and were prepared to quote a price on that basis.

Q. Was the volume of business which the respondent controlled discussed, and its wide distribution?

A. I think that was discussed or mentioned more in relation to the number of outlets or vending machines or locations, rather than the dollar volume of sales.

Trial Examiner Bayly: Well, generally, what factors were discussed that were designed to induce you to sell at a lower price?

The Witness: The principal reason that we were induced to sell, I should say—strike that out.

[fol. 140] Let me say the principal reason we wanted to sell was the fact they had wide distribution and they were selling through vending machines through which only five brands of candy could be sold, and to the extent that ours would be one of the five in any number of machines we would have at least that much chance to sell our goods, and that was the important thing to us, to get our goods before the customers.

Trial Examiner Bayly: In other words, Mr. Boid had some advantages to offer you?

The Witness: He did, definitely.

Trial Examiner Bayly: (Continuing.) —for your excess material that you had no other channel for?

The Witness: We were a small manufacturer and we were trying to get our goods before the public and that was, in our opinion, a good way to do it.

Trial Examiner Bayly: Now, getting back to this question again that I indicated, what did Mr. Boid say to you by way of setting forth his advantages as an inducement to you to sell to him at a lower figure, if any?

The Witness: I may say, sir, the advantages that he set forth, the advantages I remember he set forth, are the ones that made an impression on us, and the others he may have set forth I might not remember because they did not influence us so much. These are the ones that I remember, why we did it and were willing to do it, because he would be what we call a control selling outlet, that if he put the candy in the machines the customers had to buy that candy,

our candy, or else they couldn't get any, and if he put that in thousands of machines then, of course, it would be sold, and to the extent the candy was sold through the machines we would save the money of trying to do the job by advertising, and that was what, in our opinion, justified whatever arrangement we could make to sell the goods.

By Mr. Forkner:

Q. Mr. Mann, I have just a couple of questions I would like to ask. I think you mentioned that Mr. Boid mentioned packaging and the values of volume. Will you state whether or not buying f. o. b. factory was mentioned in any of these conversations, the fact there were savings results from having them pick up the goods at the factory?

[fol. 141] A. My best recollection about the f. o. b. factory proposition were that we could sell f. o. b. factory. I cannot even say on the stand whether we ever sold them f. o. b. factory. That I don't remember. But as to the distribution, I remember that was mentioned as a saving we could make. Whether it was made I don't know.

Q. I see, all right. State whether or not the saving resulting from the elimination of the salesman's commission was discussed, so that the manufacturer would not need to pay a salesman to call upon the respondent, and the respondent thereby would be entitled to a lower price by that amount.

A. That was among other things mentioned as affording a saving to us to justify the business.

Q. State whether or not the saying that might result from the elimination of returns for stale or unsalable candy was mentioned as another possible savings on the part of the representatives of the respondent to you in any of these conversations?

A. It is becoming difficult to answer these questions directly yes to the question. I can say that that was in my mind a saying. How specifically they were asked for or specified, it was done to the extent that it was recognized as one of the factors?

Q. If was discussed between you?

A. That was discussed. I know it was a factor in the conversation:

Q. Now, you are familiar with the fact that in the industry before the war, particularly during the period of 1936 to 1941, competition was rather keen? Are you familiar with that fact?

A. Yes.

Q. And are you also familiar with the fact that many companies in order to get business put out deals, discount deals, at different times?

A. Yes.

Q. State whether or not the fact that you would not be required to give the respondent any free goods or discount deals, as you might be required to give to others, or as was done by others in the industry, was discussed and stated by Mr. Boid at any of those conversations—in a general way, I mean?

A. In this way I can state if that again they were generally discussed, yes, sir.

[fol. 142] Q. And all of these factors were discussed in relationship to the price of goods that was to be sold to the respondent company, that is, all those factors we have talked about were discussed in relationship to that?

#### Cross-examination.

By Mr. Howrey:

Q. Now, you stated that you thought every one knew the price level in the candy industry. During this period of 1939 to 1942, were there frequent free deals between manufacturers and their customers?

A. With some manufacturers, very frequently in the early period, particularly.

Q. I am speaking about the period prior to the war.

A. With some manufacturers very frequently; with some others, not.

Q. Would those free deals reflect themselves in a lower price?

A. More goods for the same money, yes.

Q. Isn't it also true that many manufacturers furnished shelf allowances in order to move goods?

A. I don't understand what you mean by that.

Q. Did they give them an allowance, when they were introducing a new bar, did they give the jobbers a few cases to start out with as a shelf allowance?

A. Customarily—I am not familiar with the practice—more on the basis of one case free with five or ten, or something of that sort.

Q. Were premiums and prizes and baseball bats and baseball gloves and alarm clocks given—

Trial Examiner Bayly: Didn't he say he was not familiar with that?

Mr. Howrey: If your Honor please, this is cross-examination and I am certainly allowed some latitude in my examination.

Trial Examiner Bayly: You certainly are, but the witness stated he was not familiar with that practice.

Mr. Howrey: I think he testified he was not familiar with the shelf allowance, and he testified to nothing further, that I heard.

Trial Examiner Bayly: All right. Go ahead.

[fol. 143] The Witness: In varying degree those things were done by manufacturers, some a lot, and some not, in varying degrees.

By Mr. Howrey:

Q. Therefore it would be impossible, would it not, for Mr. Boid, or for any official of the respondent, to know precisely what price you or any other manufacturer sold at to a particular jobber?

Mr. Kern: I object to the question as being improper. It would be impossible for this witness to state what Mr. Boid knew exactly. He has stated that it was a matter of common knowledge in the industry.

Trial Examiner Bayly: The objection is sustained.

Mr. Howrey: If your Honor please, I should like to be heard on that, if I may.

Trial Examiner Bayly: Mr. Reporter, off the record briefly so that I may listen to the argument.

Mr. Howrey: I would prefer to have my argument on the record.

Trial Examiner Bayly: You may make your argument in the record subject to the rule stated: "State briefly, tersely and concisely your objections or exceptions, without argument."

Mr. Howrey: The direct examination of this witness elicited the testimony that—

Mr. Forkner: Just a moment, your Honor. May I interrupt to state that if the purpose of counsel's statement is to influence the witness then I think perhaps the witness should step out of the hearing room while the argument is on for both sides.

Mr. Howrey: If your Honor please, I move that <sup>the</sup> counsel's statement be stricken. I think it is entirely unethical and unprofessional for us to stand here and have a comment like that directed to us.

Mr. Forkner: Your Honor, I—

Trial Examiner Bayly: Proceed, Mr. Howrey. The witness will sit here and he may be educated or he may be confused, but we will let him sit it out.

Mr. Howrey: The direct examination of this witness has elicited testimony to the effect that everyone in the industry knew the price levels for the various classes of customers, and for that reason he assumed Mr. Boid or the respondent knew it. They have based most of their testimony in this case upon the assumption that the respondent knew the [fol. 144] prices at which other people purchased, and therefore when we got a lower price we knowingly received a lower price. That is the very issue in this case.

And now, I, on cross-examination, have been denied the possibility of exploring that knowledge to try to show that, there were different kinds of deals given by almost every manufacturer, which reflected itself in the price, and which the respondent could not possibly be aware of. When I am denied the opportunity to show that I am denied the opportunity to show that we did not induce or knowingly receive a discriminatory price, which is the charge in the complaint.

Mr. Forkner: Your Honor—

Trial Examiner Bayly: Just a minute. Go back, Mr. Reporter, and read the question.

(The question was read by the Reporter as follows:

"Question: Therefore it would be impossible, would it not, for Mr. Boid, or for any official of the respondent, to know precisely what price you or any other manufacturer sold at to a particular jobber?"

Trial Examiner Bayly: Can the witness answer that question? I want to state this, Mr. Howrey, that there is testimony in this record that men spending their lives in the candy business knew the current market price at which candy was quoted. It is quite obvious, therefore, that a buyer of candy, if he was earning his salary, would know the current market price of standard products being bought and sold.

Now, I think the testimony has gone along that line. If this question of this witness is designed to show that in a special deal whether or not that general principle would apply, not only to Mr. Boid but everybody else, that is one thing, but what Mr. Boid or any other individual had in his mind, what specific cerebellic functioning he brought to bear on a particular situation, is not a fair question to ask this witness, and the Trial Examiner has sustained that objection.

If counsel for the respondent want to ask the witness questions designed to show whether or not that principle of universal knowledge would apply in special deals, testimony along that line I would think would be competent, because in each particular transaction, as this witness has said, there were certain free goods tossed into a sale means a less net to the manufacturing seller and that, of course, [fol. 145] would affect the price. I think questions along that line would be competent, and I would permit counsel for the respondent to ask them.

Mr. Howrey: If your Honor please, when you limit the scope of our cross-examination so that we cannot test— he has testified as to general knowledge. In fact, almost every witness has testified that everybody knew what the price level was. Now, they are lay witnesses. They do not realize that we have a statute that deals not with quotations or price-lists or general levels, or anything else, but we have a statute before us dealing with the price at which

a product was sold for, and we have got to show somehow, in some way, through some witness, that those general price levels before the war were meaningless, that the actual prices at which goods were bought and sold varied widely and often from those price lists.

Trial Examiner Bayly: Any questions designed to bring out the specific conditions accompanying a sale as affecting the basic price I think would be competent.

Mr. Gravelle: This question, your Honor, uses the word "precisely," if he knows precisely the price at which these products were being sold. Now, as has been stated here, counsel for the Government has been permitted to ask these general questions, and we have consistently objected, and you have ruled time and time again and stated that that could be tested on cross-examination.

Now, if a witness comes in here, like this gentleman, who is an intelligent witness, and he has testified as to prices, he has testified to a lot of generalities, he has no books and records here, I don't know how the respondent can defend a case unless he is permitted to cross-examine, and this question here asks a specific question as to his specific knowledge.

Mr. Forkner: Three statements were made here without any statement by counsel for the Commission, and we would like to be heard, your Honor.

Trial Examiner Bayly: Go ahead.

Mr. Forkner: I would like to be heard briefly. I realize that your Honor has ruled, but argument has proceeded after your ruling, after you have ruled, and for that reason I want to say this, that the fact that there were deals, different deals in the industry, and that perhaps this gentleman, as a witness, did not know every deal, is of [fol. 146] no consequence, except that the respondent desired to have a lower price than was given to others as a price.

The fact that a deal is given of free goods, so many bars free for a limited period, is not comparable to a price. The two things are two different matters. Your Honor is correct in your ruling, we feel, that those in the industry knew the prices at which candy was sold, knew what counts and what sizes were sold. This was standard in-

formation. It was within the knowledge and scope of anybody.

If a gentleman who testified in this record, a small buyer, a small vending machine operator, knew the prices at which others bought, then it stands to reason that a company buying from twelve to fourteen million dollars worth of stuff a year would know the price. In fact, they probably would know it from hour to hour and day to day, they would know any changes therein.

Now, it is not necessary that he know, and it is not pertinent to the issues that he know that a certain deal was given on a certain date for thirty days, whereby they could get three bars free if they took so many other bars, or so many boxes. That is not a comparable item. That is not price. That is deals of short duration, and it would only confuse the issues to get into that.

Counsel is well aware of those deals, having handled the Curtiss case in which these matters were brought up.

Trial Examiner Bayly: Mr. Reporter, to bring this back to date, can you find that question for us, and if counsel want to, they can remember what I said indicating the scope of the cross-examination, as there have been some general statements, and it is not the purpose of the Trial Examiner to limit, curtail or delete the scope of any cross-examination on any issues that have been raised, or might have been raised, in support of the contentions of the complaint.

We have got this witness here and any reasonable questions going to the question of these special deals are competent and we will let you examine on that.

Just for a little test: Could you answer that question?

The Witness: I don't think I could answer that question, sir.

Trial Examiner Bayly: Very well. That disposes of it right there. Go ahead.

[fol. 147] By Mrs. Howrey:

Q. Then how could you say that Mr. Boid and everyone else knew the prices in the industry?

A. The difference is this; that it is the list price, and I think my testimony refers in some cases to the list price.

Q. You did not mean the price at which goods were actually sold?

A. It did not mean the net return to the seller. I think the testimony shows there were free deals. The list price is generally known. As to what the manufacturer gets for his goods is generally known as the list price, but that is not always the price he gets.

Q. It isn't the price, it is what you get?

A. The list price is not what you get for your goods. The actual selling price or sales price—I don't know whether this is proper, your Honor?

Trial Examiner Bayly: Go right ahead.

The Witness: For example, if you give one box free with ten at a price of 64 cents, you are certainly not getting 64 cents for it.

Trial Examiner Bayly: It is the net amount that comes into your pocket, is that right?

The Witness: That is right.

By Mr. Howrey:

Q. It is also the net amount that the purchaser pays?

A. Quite so.

Q. From your wide experience and knowledge in the industry, it is true, is it not, that during the period prior to the war that there were many such free deals and discounts given by many manufacturers?

A. With us there were. I don't know about others, but with us there were many before the war.

Q. You did not tell the respondent, did you, what each of those deals were, and what your net price was to each of your customers?

A. Not at all.

Mr. Forkner: Just one question on redirect.

[fol. 148] Redirect examination.

By Mr. Forkner:

Trial Examiner Bayly: To have such a question, it occurs to me, intelligently answered, it seems to me you should first ascertain whether the witness had the knowledge on which he could answer such questions. Second, whether such an issue was discussed. Third, whether the answering of the question in any but one way would subject this witness to an action for damages for violating the law.

Now, you have got a rather important preliminary situation there which should be defogged before an answer would mean anything. If they had never discussed this, why, of course, he did not tell him? If he did not have a running current set of costs so that he had at his tongue's end at any given time the sum total of the elements going into the distribution cost, so that that could be readily translated into terms of percentage in discount, the answer again would not mean anything.

Trial Examiner Bayly: I want counsel for both parties to understand that no witness is going to be put on at any hearing in which I am sitting and be subjected to questions that in any way will confuse him or lead him to answer but in one manner. If there is any question about the basis of his information, as to whether he had this cost system, and whether he had it available, and whether they discussed the question, it would all throw light and background on his answer and would add considerable to the merit of his answer.

By Mr. Forkner:

Q. Then as to that element of cost, you did not know what that cost would be at any particular moment, is that right?

A. Based on a specific allocation of minutes or hours, no. We knew what our overhead costs were, overhead of selling or overhead of administration.

Q. Your general costs, yes..

A. We knew that, yes.

Q. But when it comes to the actual allocation of distributions costs at a precise time in relation to a precise [fol. 149] sale of a precise quantity of product, you would not have that complete analysis in your possession or in your mind at any particular time, is that correct?

Mr. Howrey: If your Honor please, I make the same objection as the previous one.

Trial Examiner Bayly: The objection is overruled. The witness may answer, if he knows.

The Witness: We keep records of different classes of customers and generally know about the charges made, but they are over a long period of time.

By Mr. Forkner:

Q. But you did not have any precise cost analysis?

Mr. Howrey: That is the same question asked three times. The witness answered it twice, and I object to it.

Trial Examiner Bayly: The objection is overruled. The witness may answer.

The Witness: I have no figures with me.

By Mr. Forkner:

Q. Did you have any figures at those times?

A. I had no figures other than general figures.

Mr. Forkner: That is all.

ROBERT M. AMSTER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

v By Mr. Forkner:

Q. Now, will you give your full name and your address for the record, Mr. Amster?

A. Do you want my business address or home address?

Q. Either one, or both.

A. My name is Robert M. Amster. My business address is the Furniture Mart Building, Chicago, 666 North Lake Shore Drive. My home address is 6335 North Richmond Street.

Mr. Gravelle: Is your name spelled A-m-s-t-e-r?

The Witness: Yes, sir.

Mr. Gravelle: Thank you.

[fol. 150] By Mr. Forkner:

Q. What is your business?

A. I represent the Wilbur-Suchard Chocolate Company.

Q. And in what capacity?

A. As a salesman—district manager.

Q. Covering what territory?

A. The northern part of Illinois.

Q. How long have you acted in that capacity?

A. Since April, 1940.

Q. Have you been engaged in the candy business before that date of April, 1940?

A. Yes.

Q. In what connection?

A. Well, I have been a salesman, or sales manager, for various other candy manufacturers and food manufacturers.

Q. How long have you been in the candy business as a salesman?

A. Approximately seventeen years.

Q. Seventeen years?

A. Yes.

Q. And whom did you talk to in that respect?

A. With Mr. Boid. He is the only one that I recall at this time.

Q. Who was he, in respect to the respondent company, what position did he hold?

A. I recognized him as the buyer, or assumed that he was the buyer.

Q. Well, did he discuss with you the question of buying your products?

A. That is what I was up there for, was to sell the company.

Trial Examiner Bayly: All right. Now give us in substance what was said and done there regarding price, terms and conditions of sale, and so forth.

By Mr. Forkner:

Q. Go ahead and answer his Honor's question, please.

A. All I can recall is that we tried to sell them our merchandise and we were never able to sell them until 1942. I don't recall just how many times I went to see [fol 151] them, but it was my job to contact all the customers in our territory regularly.

Q. How many times did you see him between April, 1940, and 1942, when you did sell to him? How many conversations did you have, approximately?

A. Six, eight or nine.

Q. Six, eight or nine?

A. Yes.

Q. Did you talk to Mr. Boid on all those occasions, Mr. Amster?

A. Yes.

Q. State whether or not in these conversations with Mr. Boid during this time that you had these conversations whether he mentioned the different factors or methods they had for doing business, or the advantages of doing business with you in buying your products, in a general way.

A. All I recall he said is that they bought all their merchandise in 100-count or 200-count packages, and that a savings was effected that way.

"Now, I think you have mentioned that Mr. Boid on these different occasions when you talked to him desired the savings resulting from the substitution of 100-count size for the 24-count size. Were you making a 100-count size at that time when you first talked to him?

"Answer: No, we were not making the 100-count size——"

By Mr. Forkner:

Q. Now, state whether or not the method by which the respondent operates on an f. o. b. factory basis was mentioned in any of these conversations that you had, which I think you mentioned to be six, eight or nine. In other words, buying f. o. b. factory.

A. Yes, I believe it was.

Q. And was that mentioned by him as a fact to be considered in making a price to them on your goods?

A. Yes, that the price he made f. o. b. factory, rather than delivered to them,

[fol. 152] By Mr. Forkner:

Q. Will you state the substance of the conversations you had with Mr. Boid?

A. Well, the substance I can recall is that it was a matter of 100-count, the savings that could be effected if we packed 100-count, that we could possibly make a lower price if we quoted f. o. b. factory, containing no freight, and also he pointed out the terrific volume that could be secured from the company, and also the value of having our product in thousands of machines all over the country from an advertising standpoint, and a distribution standpoint, in markets that were not already represented.

That is about all I can recall.

Q. Were these things mentioned in connection with arriving at a price?

A. Well, that is what I assume. I mean, that would be the only reason for mentioning these things, would be to arrive at a price.

Q. Well, did he state whether or not he wanted a lower or a special price that was different than you sold to others for, or different than you were quoting him at these different times?

A. Well, the reasons for his bringing those things out was to give him an advantageous price.

Q. Would that be a lower price than what you quoted to him? When you say "advantageous," what do you mean? Explain it.

A. I mean a lower price, yes.

Q. And that would be a lower price than the price which you quoted to him in your different conversations?

A. Yes.

Q. And what was that price that you quoted to him after April 1940, when you talked to him on those different occasions, on the 24-count bar box?

A. I don't have that information. I don't recall that information at all. I mean, I was advised that Mr. Mann had all the information, so I did not bother to look it up.

Q. State whether or not you do recall it was a lower price than what you quoted to him, and a lower price than what you had sold to others in the same territory.

[fol. 153] Mr. Howrey: If your Honor please, I object to that question.

Mr. Forkner: I will withdraw it, your Honor.

Mr. Howrey: Unless it is shown he did quote him and what the price quoted was.

Mr. Forkner: I will withdraw that and restate it.

Trial Examiner Bayly: Very well.

By Mr. Forkner:

Q. Was the price that you quoted to Mr. Boid upon these occasions, the same price which you had quoted to other customers in your territory?

A. Well, the prices that I quoted to Mr. Boid first, was always the same price we quoted to other customers.

Q. Did you inform Mr. Boid that it was the same price as you quoted to others in these conversations, or did you let him know that?

A. I don't recall if I did that or not.

Q. State whether or not he revealed in his conversations—

A. I know later that I quoted prices that were special prices. Just what those prices were, I don't recall exactly.

Q. Will you state whether or not those special prices you quoted were the result of, in part, some of the things that he had mentioned to you, the factors and advantages of selling to his company.

A. Well, the lower prices were an acknowledgment on our part of the volume that would result from selling the Canteen Company, which we could not get from anybody else, or in that field, anyway.

Q. Now, you mentioned here that you considered volume in making a special price. Is that volume based upon sales made to distributors of the respondent company?

A. Well, all I would say—

Mr. Howrey: If your Honor please—

Mr. Forkner: Just a moment. Wait until he makes his objection.

Mr. Howrey: I would like to object to this question and this line of questioning upon the ground that the statute under which this complaint was filed specifically provides and Congress specifically stated that a seller and a buyer were entitled to reflect in their prices the savings in cost [fol. 154] of serving them, and these questions merely indicate that the parties to the transaction were trying to live up to the law, and since I am sure the Commission isn't trying to prove that we did live up to the law, that the questions being so repetitious and asked of every witness should now be ruled objectionable.

Mr. Kern: Your Honor—

Trial Examiner Bayly: Just a minute, Mr. Kern, until I have him read that question, and I will keep it in mind and then I will hear you.

(The reporter read the question as follows:

"Question: Now, you mentioned here that you considered volume in making a special price. Is that volume based upon sales made to distributors of the respondent company?"")

Trial Examiner Bayley: Go ahead, Mr. Kern.

Mr. Kern: This question is a preliminary question, it would seem, to a line of questioning directed to the matter of the controls which respondent has for its distributors as to volume purchases, and it is competent and within the complaint under Count 1 thereof to go into the matter of the effect of these restrictive covenants which is the foundation for the volume, and to go into the manner in which respondent uses that volume in inducing lower prices.

Mr. Howrey: I apparently misunderstood the question, your Honor. I thought it was carrying out the same general line of questions as the previous questions. Perhaps my objection should have been a motion to strike the answers to the previous questions. I didn't realize he was now taking up a separate subject.

I was objecting to the questions which dealt with what was said by Mr. Boid or other officials about the savings in serving the respondent.

Trial Examiner Bayley: I think the question is competent for the reasons stated by Mr. Kern, and also based on answers previously given by this witness. He initially quoted one price to the buyer and he didn't make a deal and then he made a modified or a changed quotation. Now, all of that has to do, in addition as I said to what Mr. Kern suggested here, with the controls, has relevancy on the question of inducement, dickering, effecting prices, as to whether or not these different elements were discussed to induce the manufacturer-seller to keep those in the back of his head and trim his sales a little on the price.

[fol. 155] Objection is overruled and the witness may answer.

Mr. Forkner: Read the question.

By Mr. Forkner:

Q. Do you want the question read to you?

A. I would like to have it read again.

(The reporter again read the question.)

SAMUEL M. ROSENBERG was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kern:

Q. State your name, address and business to the court?

A. Samuel M. Rosenberg, vice-president and director of sales, Universal Match Corporation.

Q. And where?

A. St. Louis, Missouri.

Trial Examiner Bayly: Does this witness appear in response to a subpoena?

Mr. Kern: Yes, your Honor. Will you hand your subpoena to the court.

By Mr. Kern:

Q. Is the Universal Match Company in the candy manufacturing-sales business?

A. It has several subsidiaries who produce candy.

Q. And is the Schutter Candy Company one of those principal subsidiaries?

A. Yes, sir, it is.

By Mr. Kern:

Q. What was the purpose of this visit by Mr. Mueller as it was indicated in his conversation?

A. Well, Mr. Mueller mentioned that the further increase from 68 cents to 72 cents was quite burdensome because of the fact that they are likewise frozen in on a 5 cent selling price, and he wanted to know if we could effect certain savings and possibly reduce this price.

Q. What savings did he particularly mention at that time?

[fol. 156] A. The possibility of going back to packing the bars in 100 or 200-count boxes, and likewise the fact that we would have no selling commission involved in the transaction.

Q. Did he mention any other savings, such as the possibility of going back on an f.o.b. factory price?

A. No, sir, I don't think that was stated.

Trial Examiner Bayly: Let the witness testify to what was said and done there first and then direct him as to specific items.

By Mr. Kern:

Q. What other matters were discussed relative to price at that conversation?

A. You mean as it relates to our prices?

Q. Yes, to the respondent.

A. Well, nothing other than if we could see some savings to be effected there that might result in a possible lower price to them.

Q. Just state generally what that conversation was, in substance, as you recall it?

A. Well, I will repeat, then, by saying that Mr. Mueller mentioned that the increase to 72 cents would be quite burdensome and leave them relatively little profit in their operation; and that he was wondering if we could effect certain savings in packing the bars for Canteen Company in either 100 or 200-count plain boxes instead of the 24-count lithographed box, and that possibly such savings and a savings in sales commission might permit us to sell to them at a lower price than 72 cents.

Q. Was there any intimation made as to the price the respondent desired?

A. Yes, they would—

Mr. Howrey: If your Honor please, I object to intimations. I think we should limit the questions to what was said and what was not said.

Mr. Kern: Strike the question.

By Mr. Kern:

Q. What was said, if anything, as to the price desired by the respondent?

A. They would like to remain at 68 cents, if possible.

Q. You had been selling them previously on a direct basis,

had you not, without periodical calls of your salesmen being made upon respondent?

{fol. 157E} A. Well, from the time that we acquired Schutte Candy Company, Mr. Golden contacted the Canteen Company either in person or by phone.

Q. He wasn't a regular salesman of yours but rather a representative?

A. That is right, as sales manager.

Q. And therefore there would have been no change in the method of selling after this price increase, would there have?

A. No, sir.

Q. What was your reply to this request for a lower price of 68 cents?

A. I told Mr. Mueller that the savings in the packing of 100 or 200 bars was something that I was not familiar with, but I did not think it would amount to too much. Also, that the 72 cents price at that point was hardly sufficient due to the increase in sugar and chocolate prices subsequent to this announcement of the 72 cent price.

Trial Examiner Bayly: Oh, you got a little increase from O. P. A. and then your chocolate and sugar went up, is that right?

The Witness: The very following day. The very following day, more than the 4 cents permitted us.

By Mr. Kern:

Q. Did you state anything in response as to the uniformity of your price structure to all accounts?

A. I mentioned to Mr. Mueller that the price is 72 cents to all accounts coast-to-coast. We have no differential.

Q. After you had advised Mr. Mueller that your price was uniform at 72 cents to all customers, what did Mr. Mueller respond as to giving further consideration nevertheless to his request?

A. Well, he suggested that we check the possibility of savings in the packing of the 100 or 200 bars which quite a few manufacturers do, whereas ours has been uniformly 24-bar packing. I told Mr. Mueller that some of our people were absent from the city and when I had a chance to discuss it with them, I would then contact him.

Q. What was said by Mr. Mueller with respect to holding up or continuing shipments pending an outcome of your reaction to his request for a price decrease?

A. He asked me to withhold the shipments until we could determine what savings, if any, might be affected.

[fol. 158] Q. Did Mr. Mueller contact you again relative to this situation which you have just described and if so, at what time and place?

A. About three or four days later he phoned me from Chicago and I mentioned to him that our people had not yet returned. Hence, I had not been able to get the data on the packing, and that just to be patient a few days longer and I would see what we could do about it.

Q. At that conversation, he wished to know of you the decision your company had reached on his request for a lower 68 cent price, is that correct?

A. On what, sir?

Q. On the lower price.

A. Yes.

Q. He wanted to know at that time what decision you had reached on his request for a lower price of 68 cents, is that right?

A. Well, the price is 72 cents.

Q. But he wanted to know the outcome of what your decision was as to his request for a lower price than the 72 cents?

A. Yes, that is right.

Q. Was anything else mentioned in that conversation as to this matter of price?

A. No, that was the substance of it.

Q. Did you later talk to Mr. Mueller again and if so, at what time and place?

A. I spoke to Mr. Mueller last Thursday here in Chicago at the convention here at the Congress Hotel. We spoke just about five or ten minutes.

Q. Did he inquire at that time again as to the decision of your company with respect to his request for a 68 cent price?

A. Yes, he wanted to know if we had discussed this question of packing and possible savings, and at that time I told Mr. Mueller that the savings as best as we could trans-

late it into pennies would not be too great from our point of view, and that with the further increases which have taken place in sugar and chocolate; that we just couldn't see our way clear to sell on any basis other than the 72 cent price.

Q. Did you state to him anything relative to your ability or inability to discover any savings in your cost by reason of the suggestions made by him to you?

[fol. 159] Mr. Howrey: If your Honor please, I think he has answered that question. I think it is repetitious.

Trial Examiner Bayly: Well, we have got an intelligent witness here. Let him answer. Objection overruled. He may answer.

The Witness: Well, I explained that in our production where we tried to produce in so-called line production operation, that the savings for our company would not be too great. It would be a question of the four individual boxes as contrasted to the cost of a 100-count box, and then the variance in the packing, so that in so far as Schutter was concerned, the particular savings would be none too great.

By Mr. Kern:

Q. What was Mr. Mueller's response to your statements along that line?

A. Well, he mentioned that he would like to have me come over there and visit with the folks at the office. Unfortunately, I had to leave that night for Columbus or I would have gone over, because they are a large customer of ours and I would have liked to have gone over there, and it was just left there and that practically ended the conversation at that point.

Q. Did he state anything in the course of that conversation as to whether or not shipments should be resumed at the new price of 72 cents or whether shipments should continue to be held up?

A. No, at that point we were to hold, continue to hold.

Q. You were still to continue holding shipments up?

A. Yes.

Q. What was the next time Mr. Mueller or any other representative of respondent company contacted you and the place of such contact?

A. Mr. Mueller phoned me at St. Louis Monday, this past Monday.

Q. That is, October 21st?

A. The 21st, yes.

Q. At what hour?

A. I would say shortly before noon. The exact moment I don't recall, but I think it was before noon.

Q. And what was the substance of that conversation by telephone?

A. That his company had decided to go ahead on the [fol. 160] 72 cent basis, and would we please effect shipments as quickly as we could and so forth.

Mr. Forkner: I am calling to the stand, your Honor, Harold C. Hakes, of the respondent firm adversely.

HAROLD C. HAKES, was thereupon called as an adverse witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Forkner:

Q. What is your position with the Automatic Canteen Company of America?

A. I am vice president of Automatic of America.

Q. What?

A. Vice President of Automatic of America.

Q. And what are your duties, Mr. Hakes?

A. I am in charge of the operating and service department which supervises the activities of all the distributors of Automatic of America.

Q. What are your duties in that connection, supervision of distributors?

A. Supervision of distributors.

Q. Are there some in Group A who were suppliers of the Automatic Canteen Company of America that were also selling directly to distributors?

A. Yes.

Q. And in connection with those sales made directly to the companies which the Automatic Canteen Company of America was purchasing and as to the direct purchases of the supplier, I mean the direct purchases of the distributors—

A. Yes.

Q. Was he making reports on that to your company as to the amounts and the company name and—

A. Yes.

Q. —and in many instances the price?

A. Yes. You see, in most instances when they purchased from the regular supplier they purchased 24 count merchandise that Automatic was not buying. Automatic in most cases bought their merchandise in hundred—  
[fol. 161] Q. Yes.

A. —or two hundred count containers.

Q. Well, I will condense this. What I am getting at is this: There are certain companies in certain items since 1942 when they had to make these reports—

A. Yes.

Q. —on which the Automatic Canteen Company of America or its officials such as yourself, knew the price of what your distributors were buying at, as contrasted to the price that you were buying at, is that right?

A. The price that they were buying at was common knowledge to everybody. They were buying at the jobber price.

Q. Which after the war began was 24 count, 68 cents?

A. 68 cents. That was the standard price throughout the industry.

Q. And before the war 24 count, 64 cents?

A. Yes.

Q. And—

A. And it has since gone up to 72, 76 and 86 cents.

Q. That is in the last few—

A. Months.

Q. —months.

A. Yes.

Q. And that was known to everybody?

A. Everybody.

Q. In the industry?

A. General knowledge to everybody in the confection industry.

Q. So there was no question about anybody in the industry such as yourselves knowing the price at which candy was sold, was there?

Trial Examiner Bayly: You mean not knowing?

The Witness: Not knowing.

Mr. Howrey: Now, your Honor, I object to this question. It is not limited to the type of purchaser. He said "price generally." If you limit it to jobber or somebody like that it would be proper but I object to it unless it is specific.

By Mr. Forkner:

Q. You understood, in your answers, you understood it was from the price at which manufacturers were selling candy? You understood that?

A. Yes.

[fol. 1624] By Mr. Forkner:

Q. In other words, I think you told me the price of twenty-four count after and before the war—what that was. Now, on hundred count before the war what was the generally accepted price on hundred count when sold hundred count?

I am not speaking of your company but of the way when it was sold to others?

A. I doubt if any of the hundred count was sold by anybody else. We inaugurated the hundred count packages and the two hundred count packages.

Q. Will you give me the answer on that?

A. Distributors that purchased supplies directly from suppliers that were also supplying Automatic did not purchase the same thing that Automatic purchased; either another product, or in a different count package. I do not

think they ever purchased the same thing that was sold to Automatic.

By Mr. Forkner:

Q. Your officials knew or should know and did know that they were getting a lower price than the price that that company sold to your distributors, isn't that right?

Mr. Howrey: If your Honor please, I object to that question upon the grounds that the assumption is not based on the record. I do not believe there is anything in evidence to show that our distributors bought precisely the same bars that we did from the same supplier.

Mr. Forkner: He has already supplied that fact. He said that—

Mr. Howrey: He did not—

Mr. Forkner: He said in certain instances, so that is taken care of by that.

Mr. Howrey: Well, I do not concede that, in my objection.

Trial Examiner Bayly: Does the witness understand that question?

The Witness: Yes.

Trial Examiner Bayly: The objection is overruled. He may answer.

[fol. 163] A: There isn't any doubt but what Automatic knew the price that the supplier was selling to our—to the jobbing trade, which would be a distributor too.

By Mr. Forkner:

Q. Yes.

A. And if Automatic got a lower price for a hundred count, they certainly knew the differential. Now, I do not know what specific case you have in mind or what prompted your question but Automatic knew their prices and they knew the price that the suppliers were charging for 24 count.

Q. No question about it.

A. There is no question about that.

Cross-examination.

By Mr. Howrey:

Q. Mr. Hakes, you testified on direct examination that prices of candy manufacturers to jobbers were generally known. By that, do you mean the price list prices or the actual invoice prices?

A. The price list prices? That is common knowledge to everybody. They send out lists to every jobber in the country and I have seen them from time to time as I think possibly everybody else has.

Q. You didn't have personal access to the books of these manufacturers, did you?

A. I have never seen any book or record of any candy manufacturer.

Q. You wouldn't know what the actual sales prices were, would you?

A. I haven't the remotest idea what they would be.

Q. Wasn't it the practice of many manufacturers to give premiums and prizes like baseball bats with certain purchases of candy, to jobbers?

Mr. Forkner: Just a moment. I object to the question unless the time is specified because the question is completely inapplicable to the period of time subsequent to the war.

Mr. Gravelle: Your Honor, throughout this whole record Mr. Forkner has asked question after question without naming the time, the place, the bar or the supplier.

Trial Examiner Bayly: Well, perhaps this is general. [fol. 164] Go ahead. Objection overruled. We can fix the time later on if we need to.

The Witness: I think practically every confectioner has had some kind of special deals whereby they gave a box of candy free for every box purchased, such as Curtiss Candy Company. They have from time to time, if you bought a box of Baby Ruth—they would give you a box of Butterfinger, or they had special deals. If you purchased a case of this, of 12 boxes, you got 6 boxes of something else. They gave premiums and many things. That has been standard

practice of confectioners for as long as I can remember, since I have been with Canteen.

By Mr. Howrey:

Q. And to know the actual price which a particular jobber or vending machine operator paid, you would have to examine either the invoicees or the books, is that correct?

A. They would have to. You wouldn't know what they bought. They may have bought some odd-lot merchandise, special merchandise or something like that, which they got at a special price. That often happens, from the confectioner.

Q. With reference to the reports which the distributors made in connection with outside purchases, aren't those reports pretty incomplete on the whole?

A. Well, we don't charge them anything for that, Mr. Howrey, and we are not particularly concerned whether they are complete or not. You see, there is no charge made by Automatic for outside purchases. They send in their reports and we tabulate them as to the amount of merchandise purchased on the outside, but what price they pay for it or anything else is of no concern to us.

Q. Well, even when you did charge them for outside purchases, your charge was not based upon their buying price, was it?

A. I don't believe we ever looked at the price, to tell you the truth.

Q. It was based upon the quantity, was it not?

A. Quantity of bars that they purchased. Price was never looked at by anybody, the price that was on those reports.

Q. Well, in those reports, it is true, is it not, that prices are frequently missing in the column marked—

A. I don't believe that 50 per cent or 60 per cent of the distributors ever put a price down.

[fol. 165] Q. Is it also true that when they put a name of a supplier down as the supplier, that that might tend to indicate the bar rather than the actual seller?

A. In a great many cases they reported to us so many bars purchased and not the name of the seller, whether it was a jobber or manufacturer or agent or what.

Q. Would those records give a complete and accurate

summary of the outside purchases of your distributors and the prices paid therefor?

A. The record would give an accurate amount of what they reported to us, but I don't know whether they purchased anything in addition to what they reported to us.

Q. You know of some distributors—

A. And we didn't care very much whether they did because they paid us nothing for them.

Q. Do you know some distributors who didn't report outside purchases?

A. Oh, I think we have had specific cases. I know our own—when I was general manager of Canteen Company, some of the managers failed to report some of the local purchases and it was picked up on their weekly report to us that they purchased something, but it did not come in on the period report, so how accurate they are, I haven't the remotest idea. I have my doubt as to whether they were very accurate.

Mr. Howrey: That is all, your Honor.

Mr. Forkner: Redirect, please.

Redirect examination.

By Mr. Forkner:

Q. Now, Mr. Hakes, would you tell me what the situation was subsequent to the beginning of the war in regard to these deals and since the period of scarcity has come up on candy, have you seen many of these deals that you mentioned in your answer to Mr. Howrey?

A. I am not familiar with any of the deals in recent years, Mr. Forkner. I know candy has been scarce and we have done our level best to secure an adequate supply of it.

Q. What is the purpose of the deals, Mr. Hakes? You are a man who is well informed in the candy vending machine field. State whether or not the purpose of deals is to promote the sale of candy when candy is plentiful and buyers are scarce?

A. The primary purpose of it by a manufacturer is to [fol. 166] promote the sale of his product in certain territories. They have certain representatives in various territories to promote the sale of their product and they are

permitted to make special deals to get coverage in that particular territory.

Q. Now, in a so-called seller's market, which I think we have had since the beginning of the war and still have, even in the postwar period, there isn't that inclination to find new markets, is there?

A. Some manufacturers, I think, took advantage of the times to get into new markets.

Q. But did they offer deals and free goods and special deals that you mentioned here?

A. I haven't any particular knowledge of them, but I am quite sure that they were—

Q. Well, what I am getting at is this. Your answer to the question, was that based on which period, before the war or after the war period?

A. Well, it has been ever since I have been connected with the business. I think most of it has been prior to the war. How much of it has been since the war, I haven't any idea.

Q. Do you know of any deals at all that any of these companies have been offering since the beginning of the war, since 1942?

A. I don't know of any deals at all—

Q. Can you name one deal?

A. I can't name any deals. That hasn't been part of my work, the purchase of any candy at all. I haven't had anything to do with that.

Q. When you stated on answer to my question that 24-count was sold for 68 cents subsequent to the war and 64 cents before the war, is that the price that was generally quoted to vending machine operators?

A. I think that was quoted to all jobbers, and I suppose to vending machine operators.

By Mr. Forkner:

Q. It does give you that general picture, doesn't it?

A. Well, it gives us a general picture of what they paid for it; but so much of it was purchased from jobbers and things that the prices were of no concern.

[fol. 167] ALBERT FRED RATHBUN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

Trial Examiner Bayly: State your name, Mr. Rathbun, in the record.

The Witness: Albert Fred Rathbun.

By Mr. Forkner:

Q. What is your position with Fred Amend Company?

A. I am sales manager.

Q. How long have you been sales manager?

A. Oh, approximately four months.

Q. Four months?

A. Yes.

Q. And where were you before you were connected with the Fred Amend Company?

A. I was in the navy four years.

Q. Are you also the son-in-law of Fred F. Amend?

A. Yes, that is right.

Q. Now, when did your price go from \$2.67 to \$2.92 per 100 bars?

A. January 15th.

Q. Did you have a conversation with Mr. Mueller after your price went up?

A. Yes. I called him to give him the new price, and he indicated, I should say, displeasure.

Q. Yes. Whatever he did, what did he say?

A. Well, he said that he was paying less than that price for Hershey bars.

Q. How was that price; did he state?

A. Well, I told him that I understand, that my understanding of the trade was that he was paying \$3.35 for Hershey and he told me that Hershey was manufacturing a special pack for vending machine operators and charging them \$2.86 a 100.

Q. Yes.

A. A 100 bars.

Q. What did you say to that?

A. Well, I pointed out to him that the Hershey bar was [fol. 168] one ounce and ours was two, which of course on a poundage basis made our price fairly favorable. I also indicated that we had about a thirty per cent increase in the cost of sugar, and we had the usual increase in the cost of labor, packing materials, and so forth.

Q. Was there any conversation which reduced this down to price per 24-count of candy, was there any comparison made?

A. Yes. Then, of course, I pointed out to him that he was paying for other types of candy on the average of around 80 cents a box, and that our price worked out on the same basis, around 70 cents a box; this, of course, with the exception of Hershey en colate.

Q. Now, you say you pointed out to him that he was buying candy at about 80 cents a 24-count?

A. Yes, approximately, that is what I should say, from a numerical standpoint most of the manufacturers were selling, not from the standpoint of size.

Q. Is this common knowledge to know of the price at which candy is being sold?

A. In the industry?

Q. Yes.

A. Oh, sure.

Q. What do you mean, "oh, sure?"

A. Isn't that part of my job to know what everybody else sells it for?

Q. Some people consider it part of the job; others don't.

Did Mr. Mueller indicate that he knew the price at which candy was being sold, or did he—

A. I judge he did. He has a title of director of purchases. If he didn't know it would be a rather unusual situation.

Q. Now, you are referring to the price at which candy actually sold at, not what it might be listed at?

A. Well, I should say this. That price is the price that the manufacturer sold it to the jobber. Of course, what he sold it to any one else, I don't know.

Q. That was the actual price?

A. My source of information, of course, is to the jobbers.

[fol. 169] Cross-examination.

By Mr. Howrey:

Q. Now, you increased your price from \$2.67 to \$2.92 per hundred on January 15, 1946. Did Automatic Canteen accept that price and is it now paying that price?

A. Oh yes.

Q. When you stated to Mr. Mueller that Automatic Canteen Company of America was paying 80 cents per box for its candy, you did not have any access to their records, did you?

A. No, but I rather imagined they were paying the same as everyone else.

Q. Do you know for a fact what Automatic Canteen Company of America was paying to its various suppliers?

A. Of course not.

Q. Then when you made that statement you were just talking in general language and not talking about something within your actual knowledge?

A. No, that is right. I did not. When I talked with Mr. Mueller, I did not find it necessary that he prove what he was paying nor I prove my statements as far as the fact. I knew what the candy was selling for. That is common knowledge.

Q. And is it common knowledge what every single purchaser pays every single manufacturer for its candy?

A. During this period, at the present, when the manufacturer has no reason to, how shall I put it, give anything or change any price to any particular distributor—in other words, he can get today almost what he asks for from any type of distributor, so why should he sell any company at a different price.

Q. I am asking you whether you know as a matter of fact, and whether it is common knowledge what Curtiss charges to each and every one of its customers including syndicate stores, jobbers, drug stores, automatic vending machines, and the other various classes of customers?

A. Pretty well.

Q. Do you have access to the Curtiss books?

A. No.

Q. Have you seen the Curtiss invoices to its various classes of customers?

[fol. 170] A. No, I have not directly but my men covering the trade of course, the retail trade, naturally—

Q. As a matter of fact, hasn't Fred Amend charged different prices to different customers at various times?

Mr. Forkner: Just a minute. I don't see what that has to do—

Trial Examiner Bayly: Well, he is testing this witness' general knowledge.

Mr. Forkner: But what Fred Amend Company does in selling is an entirely personal matter and not for general information.

Mr. Howrey: The record shows by various exhibits that there are various prices to various customers and I do not want the record—

Trial Examiner Bayly: You may ask the witness a question. Objection overruled. Proceed:

Mr. Howrey: I believe I have a question before him.

The Witness: Would you repeat it?

Mr. Howrey: Read the question.

(The reporter read as follows:

"Q. As a matter of fact hasn't Fred Amend charged different prices to different customers at various times?"

Trial Examiner Bayly: Now, if you will listen to this witness he is going to answer this question.

A. Before 19—I should say before 1942, yes.

Trial Examiner Bayly: What you are saying Mr. Rathbun is that this period that you are describing was a seller's market and there was a demand for the product?

The Witness: Yes.

Trial Examiner Bayly: And the manufacturer-producer could sell and get what he wanted? There was no occasion to give any special price concessions, is that right?

The Witness: That is right. The size of the distributor meant nothing to him at all.

Trial Examiner Bayly: Off the record.

(Discussion off the record.)

Trial Examiner Bayly: On the record.

By Mr. Howrey:

Q. I show you Commission's Exhibit 56-A and B, and ask you if you have ever seen that exhibit before? It was submitted here through Mr. Fred Amend.

Mr. Forkner: Your Honor, I don't see the purpose of [fol. 171] this. It has not been brought up in direct examination. It is on matters outside, as before this witness' time and experience.

Trial Examiner Bayly: Well, I don't know — period of time these prices cover but let's let the witness answer if he can.

A. Well, no sir, I have never seen this before.

By Mr. Howrey:

Q. I call your attention to the fact that according to this exhibit submitted through Mr. Fred W. Amend in the year 1945, the price of your company to Automatic Canteen Company per bar was .1445 cents and .786 cents; that your company's price to others in the same count to Automatic was .1619 and .1789 cents, and your prices to the others in other counts was .1829 cents. Now, those prices are not the same, are they?

A. No, they are not. I rather imagine that the Office of Price Administration had something to do with it.

Q. They are not the same, are they?

A. No.

Q. So you did not charge everybody the same price in 1945, did you?

A. Not according to this.

Q. So it would not be common knowledge that everybody knew what the price was and that it was the same in that year for all suppliers and all sellers?

Mr. Forkner: Do you get the question?

The Witness: Yes.

A. I think I should qualify it. These prices, I have no doubt, are based on the Office of Price Administration, and in any case, of which that would apply to any other manufacturer, that would be the same, but since a few months ago, we have not had the Office of Price Administration and

I would see no reason why any manufacturers would have to have any different price other than that which he gave to the candy and tobacco wholesalers.

By Mr. Howrey:

Q. Don't you know as a matter of fact that there are varying prices, various purchasers, based upon any number of conditions which you may not be familiar with?

[fol. 172] A. Oh, I appreciate that, surely.

Q. Is that right?

A. Yes.

C. S. ALLEN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you state your name for the record, please?

A. C. S. Allen.

Q. Mr. Allen, are you president of the C. S. Allen Corporation, located in Webster, Massachusetts?

A. Yes, sir.

Q. How long have you been president of the corporation, and how long has your company been in business?

A. Twenty years in business and 20 years a president.

Q. Where was it located before it went to Webster, Massachusetts?

A. In the Gair Building, Brooklyn.

Q. What type of product had you sold previous to the war?

A. We only sell one brand, toffee.

Q. Is that a 5-cent bar?

A. No, individual pieces.

Q. Are those bars sold for any record machine purposes?

A. Previous to the war?

Q. Pre-war?

A. We sold them to the record machines, yes.

Q. State whether or not you sold toffee bars to the re-

spondent here, the Automatic Canteen Company of America?

A. Yes.

Q. Before the beginning of the last World War?

A. No. We were only in business since 1926. The last World War?

By Mr. Forkner:

Q. Now, had you made 100 count up until your firm had the negotiations with the Automatic Canteen Company of America, Mr. Allén?

[fol. 173] A. No.

Q. And was it after the respondent had been in communication with your firm and in contact with your firm that you first made 100 count pack of your candy?

A. That is right.

Q. Is there any request made to have a lower price which might result from the elimination of free goods or discount deals that might be given to some of your other customers?

A. Oh, that was included in the reason why they should have a lower price.

Q. Now, as the result of these negotiations did you buy a lot of cartons?

A. We did.

Q. And do you recall how many you bought?

A. A quarter of a million, I think.

Q. And why did you buy those cartons?

A. On the authority of the Automatic Canteen Company.

Q. And what do you mean by "on the authority"? Were those charged to you or charged to them?

A. Charged to us. They were charged to us.

Q. And who arranged for the boxes to be bought and where they were to be bought, if you know?

A. We bought and paid for them after the sketch and the size was approved by the Automatic Canteen Company.

Q. And did they also tell you where you could get the boxes and at what price?

A. I don't know; I don't remember.

Q. Now, I see by Commission's Exhibit 102-K that you quoted them a price of \$2.15 per 100 packages f. o. b. your factory. Will you tell me whether or not that was the price at which you sold to them ultimately?

A. No, we sold to them at \$2.05.

Q. And did that result in part from these representations which you just testified to here as to savings that you could make?

A. It was.

Q. Did you find that that was true?

A. The savings?

Q. Yes.

[fol. 174] A. No.

Q. Now, I show you what has been marked as Commission's Exhibits 102-L and 102-M, which is also Commission's Exhibits 85-A and 85-B, and ask you if that letter quotes the price at which you sold, namely, \$2.05 per 100, f. o. b. factory?

A. That is right.

Q. And were you influenced in making your price by the representations made by Mr. Anderson, treasurer of the Automatic Canteen Company, whose letter is these exhibits?

A. That is correct.

Mr. Howrey: May I see that exhibit?

(Exhibit is handed.)

Have you answered the question?

The Witness: Yes, sir.

By Mr. Forkner:

Q. And as the result of that did you order and have printed 25,000 special cartons, as shown on Exhibits 102-L and 102-M?

A. I did.

Q. I show you Exhibit 102-Z, which is a letter signed by Mr. Anderson, treasurer of the Automatic Canteen Company of America, dated May 15, 1937, in which there is written in pencil the word "No," off to the left. Whose handwriting is that (handing letter)?

A. That is mine.

Q. And what did that "No" mean on that letter? Can you explain it?

A. We wouldn't give them f. o. b. Chicago.

Q. And did you put that in a letter which is now Commission's Exhibit 102-Z-2, and also Commission's Exhibit 86-D, and tell them in that letter that it was a physical impossibility to sell your line to them f. o. b. Chicago, based on your costs?

A. That is right.

Q. Now, the candy which you sold to the Automatic Canteen Company of America, to which you have testified, was that of the same weight and quality as the candy which you sold to other customers?

A. Yes.

Q. And was that in conformity with the directions which the Automatic Canteen Company gave to you in Commission's Exhibit 102-Z-5?

[fol. 175] A. With one or two exceptions.

Q. What were those exceptions (handing letter)?

A. Printing that they required was not exactly as they wanted it.

Q. How did they want the printing?

A. They wanted the Canteen's name to be put on it.

\* \* \* \* \*

Q. Now, I show you Commission's Exhibit 102-Z-29, which is a letter dated November 26, 1937, signed by Ralph Boid, assistant secretary of the Automatic Canteen Company, the respondent firm, and ask you what the meaning of that statement is in the second sentence there, about quoting f. o. b. Did that question come up, or what is that about?

A. Why, in view of the fact that we would only sell f. o. b. New York, they would not use any of our product in the Chicago or Middle West areas. They only let us supply some of the eastern outlets.

Q. Will you state whether or not there were various attempts on the part of the respondent to get you to sell to them through Chicago instead of New York?

A. Oh yes.

Q. How many attempts were made along that line, if you recall?

A. I can't say, but there were several letters that went back and forth. We couldn't do it.

Q. Commission's Exhibit 102-Z-56, I show you that and ask you if that is one of the letters you refer to in which they attempted to get you to sell them f. o. b. Chicago as well as New York?

A. That is correct, sir.

Q. Would that be, in your terminology, a lower price received by you for ~~your~~ goods?

A. Certainly.

Q. Would that be a lower price than that received from others you were selling candy to at the same time?

Mr. Howry: I object to that question. That is a conclusion.

Trial Examiner Bayly: Please read the question.

(The question was read.)

Trial Examiner Bayly: It calls for a factual answer. Objection overruled. The witness may answer.

By Mr. Allen:

A. Yes.

[fol. 176] By Mr. Forkner:

Q. What connections did this letter of February 8, 1939, have with cartons, if any, or your loss of cartons, since cartons are not mentioned in there?

A. We had a lot of cartons we wanted to get rid of, bought especially for them, and we were pressing them to give us an order for the goods; or pay for the cartons, and that is our counter offer that came back, that if we would make a price of 18 or 20 cents a carton less f. o. b. factory they might unload them in Chicago.

Q. And did you write in reply to that letter<sup>2</sup> one dated February 13, 1939, which is Commission's Exhibit 102-Z-58, in which you stated that you would take a small loss, and quoted them \$1.95 delivered in Chicago?

A. I did.

Q. Will you explain why you did that?

A. Unload the cartons. To unload the cartons.

Q. And at whose instance were those cartons, first ordered?

A. On the authority of Automatic Canteen Company.

Q. And did they promise to take care of those cartons when they had you ~~order~~ them?

A. It was on their authority we ordered them, and naturally we would assume they would accept the responsibility if they were not sold.

Q. State whether or not you were thereby forced to quote them a price of \$1.95 f. o. b. Chicago?

Mr. Howrey: I object, unless counsel identifies them, so the witness will know who he is referring to.

By Mr. Forkner:

Q. In answer to the question you just answered, to whom were you referring?

A. Automatic Canteen Company.

Q. And that is the respondent in this case?

A. Yes.

Q. Did you ever sell to anybody else at \$1.95 f. o. b. Chicago?

A. No.

Q. Now, I see here another letter of the series, February 16, 1939, which is Commission's Exhibit 162-Z-59, in which Boid asked you whether that price of \$1.95 delivered in Chicago applied only to goods moved to Chicago, or whether you are willing to make a price concession they can pass on [fol. 177] to distributors? He has become interested there, is that it? Instead of someone else, he wants it for himself?

A. That is right.

Q. Now, previous to February 23, 1939, or thereabouts, had you refused to quote \$1.95 f. o. b. Chicago to the Automatic Canteen Company for their sales?

A. I did.

Q. Can you just explain to his Honor in the record how you happened to quote that price, so he will thoroughly understand it?

A. We thought we were stuck for the cartons, and to get rid of 200,000 we thought we might as well take a loss.

We weren't going to get any more business, so we cut the price.

Q. And did you make any claim to the Automatic Canteen Company that they were responsible for getting you in that predicament?

A. They thought, or led us to believe when we started the business, it would be in the millions. Otherwise we would not have gone into it.

Q. Did this operation result in a net loss to you?

A. Definitely.

Q. Would you have attempted to sell the Automatic Canteen Company if you had known all the circumstances as you know them now?

Mr. Howrey: If your Honor please, this witness, as I understand, was called adversely, and it now appears he was not called adversely. So I move to strike all his testimony up to date on the ground that it is not normal examination.

Trial Examiner Bayly: Objection overruled. Proceed.

By Mr. Forkner:

Q. Was Boid the buyer of Automatic Canteen Company, Ralph Boid?

A. I really can't say whether it was Boid or Anderson, which one was there. Probably the signatures on the letters would tell.

Q. I show you these letters.

A. Boid is signed as assistant secretary there.

Q. State whether or not he was one of the men who negotiated for prices?

A. Oh, yes.

[fol. 178] Q. In other words, he talked price and size and count and freight, and so forth?

A. Yes.

Q. Did you finally ask Mr. Boid if he would not give you a check covering those boxes, in your letter of January 18, 1939?

A. That is correct.

## Cross-examination.

By Mr. Howrey:

Q. With whom did you talk?

A. I didn't talk at all; Schillinger talked.

Q. You were not present?

A. He reported his conversation when he came back to New York.

Q. With whom did Mr. Schillinger talk?

A. I don't know whether he spoke to Boid or Anderson.

Q. In other words, you were not present? You didn't take part in any of the conversations which you outlined here today?

A. No.

Q. You don't know of your own knowledge that any such conversations ever took place, do you?

A. That is a good question. I can only say that Schillinger told me they did, sir.

Q. Tell me what Mr. Schillinger told you as to the date the conversations took place?

A. As to the date?

Q. Yes;

A. I don't know, sir. Ask me something——

Q. You were not present at any conversation with reference to advertising value?

A. No, I was not present at all.

Q. You were not present at any conversation? Is that correct?

A. That is correct.

Q. Will you tell us, Mr. Allen, why the Automatic Canteen Company did not continue to purchase your product, if you know?

A. It didn't sell.

(Witness excused temporarily.)

[fol. 179] GEORGE F. WALLBURG, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Now, Mr. Wallburg, you are treasurer of W. F. Schrafft & Sons Company?

A. Yes, sir.

Q. How long have you been treasurer?

A. About 15 years.

Q. And who are the other officers of the company?

A. The president of the company is my brother, William B. Wallburg.

Q. What is his position with the company?

A. President.

Q. Are you the main owners?

A. No, we are a wholly owned subsidiary of Frank G. Shattuck Company, New York.

\* \* \* \* \*

Q. Now, I show you Commission's Exhibits 106-E, F and G, and ask if that letter which was received from the Automatic Canteen Company, signed by F. H. Anderson, treasurer of the Automatic Canteen Company, and directed to your sales manager, Mr. J. M. Gleason, dated February 15, 1937, was brought to your attention?

A. Yes.

Q. And will you explain the circumstances under which it was brought to your attention?

A. Well, as I remember it, the general proposition of selling the Automatic Canteen Company had been under discussion, and when Mr. Gleason received this letter he brought it to my attention so that we could go over the various propositions that were made in it.

Q. And did you do that and give him the results of your survey in Commission's Exhibit 106-G-1 and 106-G-2, which is a letter dated February 20, 1937, and signed by Mr. J. M. Gleason, your sales manager, at that time?

A. Yes.

Q. Did you compose this letter? That is a letter of February 20, 1937.

A. No.

[fol. 180] Q. Did you approve its contents?

A. Yes.

Q. Are the statements therein contained true?

A. Yes.

Q. Is this statement true, contained in the second paragraph:

"The superior quality of the materials used in the manufacture of our product, our rigid adherence to established standards, combined with the unusual precautions we take to insure uniform quality, will not permit of our meeting the lower prices quoted by other bar manufacturers, as indicated by your letter, in spite of the fact that we have perhaps the most scientifically arranged factory, from a production standpoint, of any in the country."

Is that true?

\* \* \* \* \*

Q. Now, I notice there that you state that your sales costs and carton costs are much lower than stated in the letter of Mr. Anderson. How much lower were they, if you recall, than he stated in his letter of February 15, 1937?

A. I don't remember what he stated.

Q. It's right there. It is February 15, 1937, Commission's Exhibit 106-E, F, and G.

A. Well, as regards the sales costs, he states 7 per cent. This is 10 years ago, but as I remember it, I think our sales cost at that time would run around 6 per cent. As regards the carton costs—did you ask about the carton costs?

Q. Yes.

A. As regards the carton cost, now I will have to rely entirely on my memory, because the records that far back have been destroyed. But I would have said at that time our carton costs ran about  $2\frac{1}{2}$  per cent.

Q. Instead of 5 per cent?

A. Yes.

Q. As specified in his letter?

A. Yes.

Q. Based on your figures, \$2.37½ was the lowest price that you were able to offer at that time?

A. Yes.

[fol. 181] Q. Do you recall you authorized Mr. Gleason to quote to Mr. Anderson a price of \$2.30 per 100 when Mr. Anderson had offered to pay only \$2.22?

A. Yes, that was a price of \$2.30 per 100, covering our entire bar line.

Q. Then you authorized Mr. Gleason to quote that back to Mr. Anderson?

A. Yes.

Q. You knew at the time you quoted the price of \$2.30 that Mr. Anderson had informed Mr. Gleason that they could not pay, or would not pay, over \$2.22 per 100?

A. Yes.

Q. I go now to Commission's Exhibit 106-E, F and G, in which Mr. Anderson detailed a lot of factors to be considered. I am going to ask you questions on each one, as to what consideration you gave to each factor in making your ultimate price to them.

Trial Examiner Bayly: We are going to have Mr. Wallburg say if he considered that element, and so forth.

By Mr. Forkner:

Q. Now, take up the first element of f. o. b. factory, and the claim that the suppliers advise that their freight costs range from 5 per cent to 7 per cent of the billing price, and using any other letter that you may have there in connection with the same matter that you desire to use, such as—

A. I am not quite sure just what your question is, Mr. Forkner. Do you want me to take these various items one after the other and tell you which we considered?

Q. I want you to take up the items which influenced you, or which you relied upon in giving or making your ultimate price, taking up first about the f. o. b. factory basis, and the amount presented there in this letter of February 15, 1937,

A. Well, naturally the fact that we would save the freight shipping charges was a factor. The reduction of selling cost—

Q. How about the percentage given there, 5 per cent to 7 per cent?

A. That was higher than what ours would be. Ours would be about 3 per cent. The sales cost was naturally the saving in sales cost, which naturally was a factor, and was not quite [fol. 182] as high as they gave, of 7 per cent. Ours would be about 6 per cent, if I remember. The saving of cartons, the fact that they were to furnish the cartons, with no cost to us, was a factor. Returns and allowance was no factor. Free deals and samples was no factor.

Q. Why?

A. Because we never furnished free deals. We furnished few samples. And our returns and allowance for credit losses were very small. They were no factor. Do you want me to go further than that in saying how we arrived at that final price?

Q. No, we are just talking about the facts mentioned in this letter. How about the statements contained in the third from the last paragraph on Exhibit 106-E, about advertising value?

A. Well, I included that in the sales cost. You mean advertising value of our distribution?

Q. Yes.

A. Yes, that was a factor.

Q. Will you explain what is meant, if you know, by the statement at the bottom of Exhibit 106-E, as follows:

"They also advise us that typically 5 per cent of the selling price, or just over 3 per cent, will cover the 24 count carton or retail counter display carton."

What would 5 per cent of your selling price have been at that time?

A. It would have been 3 cents.

Q. Would that mean 3 per cent?

A. I don't know what that 3 per cent is, unless it is a misprint for 3 cents.

Q. I see. And 3 per cent of candy selling at 64 cents would be a little over 3 cents?

A. 5 per cent.

Q. Yes, 5 per cent.

A. Yes, 3.2.

Q. Now, I refer you to the next exhibit, which is Commission's Exhibit 106-Q, and refer you to the second paragraph there, and ask you whether or not your cost department was in consultation and in touch with the cost department of the respondent in regard to the cost of cartons?

[fol. 183] A. Our purchasing department, not the cost department.

Q. All right.

A. I believe they had some information, or that they were in touch with them regarding the cost of corrugated cartons. I don't know whether it was by telephone or letter or what.

Q. But comparisons of costs were made between the supplier and the buyer in this case on the cost of cartons?

A. Yes.

Q. Now, I show you what has been marked as Commission's Exhibit—well, it is on the back of Commission's Exhibit 102-Z-2, apparently not marked separately, in long-hand, and ask you if you recognize the handwriting there and the signature (handing)?

A. Yes, I would say that was written by Mr. Gleason.

Q. Now, will you explain in substance what they say about it and if it was brought to your attention?

A. Well, as I remember it, the Automatic Canteen Company sent us in a list of goods which had become unsalable for one thing or another, and they wished to receive credit for them. And, as shown in this letter, Mr. MacKendrick evidently wrote Mr. Gleason to that effect, and Mr. Gleason, as shown in his pencil hand, stated the basis on which we quoted the Automatic Canteen Company was definitely stated, that we would not have to take back any spoiled goods. So we turned down their request for credit on the goods which they returned as unsalable. On the second part of the letter regarding 338 empty cartons, it was also agreed by the Automatic Canteen Company, as I think

brought out in one of their earlier letters, that any spoilation we had left over, due to the fact they discontinued handling any of our numbers, they would reimburse us for the cost of those spoils.

Q. Was that one of the factors which you considered in making a price to them, one of the elements?

A. Yes—

Q. It was taken into consideration along with many others at the time?

A. Yes.

Q. Can you find a letter—can you point out where you [fol. 184] said you wanted to be reimbursed for these cartons? What exhibit is that?

A. Regarding the returned goods, I think that is Exhibit 106-Z-5. I think that exhibit answers your question.

Q. What date is that?

A. October 18, 1937.

Q. That is written, however, by Mr. MacKendrick?

A. Yes.

Q. State whether or not it was against your policy to give away free goods?

A. Yes, very much against our policy.

Q. Is that part of the basis of your company's refusal to join in this World's Fair donation of candy bars, as contained on this letter of April 15, 1939?

A. Well, we refused that partly because we don't give away free goods anyway, and partly because we didn't think it was a proper place or a proper way to sell candy, in slot machines in the World's Fair, in the hot sun. We figured the stuff would not be fit to eat, and we didn't want any part of it.

Q. I notice you mention you have a large number of wrappers printed with the name "Canteen" on it, that they constituted a total loss. Was that ever compensated for?

A. I don't think so.

HARRY GILSON, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. What is your full name?

A. Harry Gilson.

Q. Your company is the E. B. Washburn Candy Company of Brockton, Massachusetts?

A. Yes, sir.

Q. About how far is that from here?

A. About twenty-five miles.

[fol. 185] Q. What is your position with the company?

A. President and treasurer.

Q. How long has your company been in business?

A. Fourteen years.

Q. What kind of bars do you make?

A. We make five-cent bars, cocóanut bars and peanut bars.

Q. Have you made sales to the Automatic Canteen Company of America?

A. Yes.

Q. Have you been served with a subpoena duces tecum, and have you brought in certain material in response to that subpoena?

A. Yes, sir.

Q. Have you made a summary of the sales to the Automatic Canteen Company of America?

A. I have.

By Mr. Forkner:

Q. Did you make one hundred count before you made any sales to Automatic Canteen Company in 1938?

A. No.

Q. How does that happen you started to make a hundred count for them?

A. To begin with, we were not equipped to turn out too much candy in those years; and we know--there was a

Mr. Andruss in Watertown contacted us and wanted to buy the candy.

Q. Is that the distributor of Automatic Canteen Company?

A. Yes, I called on him and found it, what he wanted and told me I would have to get in contact with Chicago on it and I quoted them a price on a hundred count because that is the way they want it.

Q. Did he tell you they wanted to buy it that way?

A. They told me when I got to Chicago.

Q. What about the FOB price, how did you find out about that?

A. I originally gave them a prepaid price and I found the orders coming in from the company were for shipments out west and the freight was way too high so I suggested we should give them FOB prices and have them ship where they pleased.

[fol. 186] Q. You had been selling 24 count before the year 1938, had you not?

A. That is right.

Q. And that price was 60 cents per 24 count?

A. Yes.

Q. Was that the delivered price?

A. Delivered price.

Q. How did you happen to make an FOB price to Automatic when you had been shipping to others on a delivered price?

A. For this reason: Canteen of Chicago would send me orders for instance, to St. Louis and we never shipped further west than Pennsylvania and our trade price was based on Pennsylvania and not Missouri.

Q. Did they ask you for a FOB price?

A. No, sir. I suggested that.

Q. For your own protection?

A. Yes.

Q. Did you also suggest a hundred count instead of 24?

A. No, they asked for that.

Q. Did they give you any reason for the hundred count?

A. Not that I can recall, y

Q. Who did you talk to?

A. Mr. Boid of Chicago.

Q. What is his position with the respondent?

A. He was purchasing agent.

Q. Where did you talk to him, out in Chicago?

A. Yes, sir.

Q. What did he tell you? Just give it to us in substance what he said.

A. He told me Mr. Andruss was sold on the bar and he wanted to get the bar, he had a lot of calls for it and he was interested in buying it.

Q. Is that all the conversation you had in substance?

A. We talked price. Naturally, he asked me how much it would be and I told him the price.

Q. Did you tell him the price of your 24 count you had been selling before?

A. I could not recall. If he asked it, I would have.

Q. You said you talked price?

A. Yes, on the hundred price.

Q. Did you ever talk price on the 24 count?

A. No, sir. They didn't buy 24 count.

Q. It would not take very long to mention the price, would it?

[fol. 187] A. No.

Q. What else did you discuss?

A. The candy convention was on at that time and we were talking about the good-time we were having; that is about all.

Q. Is that the only conversation you had with him about terms and conditions of sale?

A. Yes, sir.

H. R. CHAPMAN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. You are H. R. Chapman?

A. Yes, sir.

Mr. Forkner: I am calling Mr. H. R. Chapman adversely.

By Mr. Forkner:

Q. Now, Mr. Chapman, what position do you occupy with the New England Confectionery Company?

A. Vice-president in charge of sales.

Q. And how long have you been in charge of sales?

A. About 20 years.

Q. And what does your company make?

A. We make a line of 5-cent bars, fancy packages, and several specialties.

Q. And where do you sell that product, in general? All parts of the United States?

A. All over the United States, but principally east of the Mississippi.

Q. What type of customer do you sell to?

A. We sell to jobbers and to general stores, large department stores and vending machine operators.

Q. And how long have you been selling to that type of customer? Since you have been in the business?

A. No, I wouldn't say they were all in that category. We started selling the Automatic Canteen Company in August of 1938. Prior to that we had sold a few smaller vending machine operators, one or two.

Q. Yes?

[fol. 188] A. We had sold one or two direct, and others through our jobbers.

Q. Yes?

A. But our relationship with them started in August of 1938.

\* \* \* \* \*

Q. State whether when you told them about the 24 count and the 60 count you talked about selling to others?

A. No, I didn't quote any prices on this first interview. We first talked generally about establishing relationship. Subsequently, when I got back to the office and we had some figures prepared on the 60-count and the 24 count, we wrote them quoting prices, which were accepted, and put on the list, and from then on the orders came in by mail.

Q. In regard to this 100 count, state what he said, in substance, or Anderson, or did, either one, as to why they

A. The principal reason was to save the time of their distributors in refilling machines, and the 100s was not a ponderous package to lift. I raised that question: "Isn't it too heavy?" He said, "No, our operators would just as soon carry 100. It saves them going back to fill their load again as they walk through the factories in different locations." He said, "Of course there is some saving in cost."

Q. He wanted you to take that into consideration?

A. He wanted me to take that into consideration, which we did.

Q. Now, had you been selling f. o. b. and delivered before that time on your packs, the different packs, 60 or 24?

A. The 60 count pack we had prepared for one account where we were prepaying the freight. I don't recall if we ever sold any 60 packs f. o. b. factory before that. I think they were all in the freight allowed category.

Q. Freight allowed? You mean delivered price?

A. Yes, that is what it means. He shipped f. o. b. and then allowed freight at the actual rate up to a maximum of \$1.50 per 100 weight on the gross weight.

Q. Did Mr. Boid or Mr. Anderson explain to you how they wanted to handle it on freight during this conversation?

A. No, except they were perfectly willing to buy f. o. b. factory.

[fol. 189] Q. State whether or not they stated before that any relationship to merit a lower price if they did that?

A. They said they preferred to do it that way, because each individual would pay his own actual rate, instead of averaging a delivered freight rate, in our cost.

Q. Did they tell you about volume and how much business?

A. They made no promises as to volume. They told us about the number of machines operating, which I think at that time was in the neighborhood of 10,000.

Q. Was the question of advertising mentioned?

A. No, no. The question of advertising was not mentioned. We in the early days of the vending machine business had a lot of complaints from our retail customers about the vending machine business. In other words, the jobbers and retailers pictured some new competition for them which was going to take business away from them in their local

stores, but it did not work out that way. These sales were made at a time of day when retail customers could not get to a retail store. So we discovered ourselves there was some advertising value in having the goods on sale at the vending machines.

\* \* \* \* \*

Q. State whether or not you gained the impression from the conversation with Mr. Anderson and Mr. Boid that they would not buy from you unless you changed to 100 count?

A. No, I did not.

\* \* \* \* \*

By Mr. Forkner:

Q. Why was it you were indifferent to this big account?

A. Because I had the impression it might affect our regular production lines in the factory and I wanted to wait until such time as we were better equipped.

Q. Do you mean changing to a different count?

A. If you are running 24 count, and you have to stop to change over to 100, unless you have a flow of volume, it runs your costs up. Every time you stop the straight line and change the machines and put a new shift of girls packing at the end of the belt, it costs you money.

Q. You knew before they wanted a hundred count?

A. Yes, I knew that was usual.

[fol. 190] Q. Where did you gain your knowledge about the 100 count?

A. We talked to their competitors, of Canteen, and we knew what they were doing because one of our other customers was in competition with them in Detroit in the Automatic Company.

Q. What company?

A. It is F. & W. Products Company.

Q. And you knew from them they wanted 100 count only when they bought?

A. We were selling them 60 at the time.

Q. Did you learn what they wanted in profits?

A. No, we never discussed profits with F. & W. with Automatic Canteen.

Q. Did you gain knowledge of what price you would have to submit to them to gain the business at that time?

A. No; sir, they asked us to quote.

Q. Did they ask you to take into consideration the facts you have mentioned?

A. Yes. In the course of conversation that was pointed out, and they also said others had done so.

Q. Done what?

A. Taken those into account.

Q. And made a price lower by reason of those factors?

A. Gave them the benefit of the savings that resulted.

Cross-examination.

By Mr. Howrey.

Q. Mr. Chapman, did you testify your company did not have deals such as giving free goods and that sort of thing to the jobbers?

A. Yes sir.

[fol. 191] DANIEL S. VECCHIA, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Forkner:

Q. Would you give us your full name, your address, and the company you represent?

A. Daniel S. Vecchia, 13 Williams Street, Medford, Massachusetts.

Q. In what business are you engaged?

A. Confectionery business.

Q. What is the name of your company?

A. Phoebe Phelps Caramel Company.

Q. What is your position in the company?

A. Partner.

Q. Did you have a talk with any of the officials of the Automatic Canteen Company before you started selling them?

A. Yes, I had a talk with one of the officials of the Automatic Canteen Company.

Q. What was his name?

A. Boid. Mr. Boid.

Q. What was his position with the respondent?

A. I presume he was purchasing agent. I really don't know.

Q. What kind of charge did he perform, was he purchasing or buying?

A. Yes, he was buying candy for his company.

Q. Where did you see him?

A. Well, I saw him at a hotel.

Q. In what city?

A. Boston.

Q. Did he call you or did you call him?

A. He called me.

Q. And you made the appointment with him?

A. Yes, I did.

Q. And you talked with him?

A. I did.

Q. Give us some of the conversation you had with him?

[fol. 192] A. Well, that was—

Q. Just a moment, before you give that. You were making at that time a 24 count candy?

A. I was making all packs at the time, 24, 60 and 100.

Q. What was your price on the 24 count?

A. It varied, as I told you, 60, 64 and 68.

Q. And the 60 count?

A. \$1.35 and \$1.40.

Q. And the 100 count?

A. The 100 count, \$2.35 delivered.

Q. Go ahead and tell us the substance of your conversation?

A. Well, he asked me if his company could acquire some candies from us.

Q. Yes. Did you quote him prices of the different counts you had?

A. Yes.

Q. What did you tell him your 24 count candy sold for at that time?

A. Well, I quoted the price we had at the time. We had a list of 60, 64 and 68 for the 24 count items; and \$1.35, I believe and \$1.40 for the 60 count items; and \$2.35 for the 100 count items.

Q. Was that on some kind of price list you showed him, or did you just tell him?

A. No, I discussed it out of my mind.

Q. Was that for mint juleps and Billy B. Van fruit bars?

A. No, that was mint juleps and Phoebe Phelps caramels.

Q. Did you state anything with respect to buying your 24 count candy which you quoted, or your 60 count?

A. No, but he said he would like to buy some of the long count packages.

Q. What count is that?

A. That is the 100 count.

Q. Did he give any reason for that?

A. Easier to handle for the distributor, that is about the only reason I would know right now.

Q. And you quoted him at that time what price on 100 count?

A. Well, I believe it was the regular \$2.35 price at the time for the 100 count.

Q. Will you look at Commission's Exhibit 121-A, which fol. 1931 is submitted, and the invoices attached, you say you sell 100 counts at \$2.25?

A. Yes, that was a differential basis.

Q. What do you mean by differential basis?

A. Freight rate.

Q. Is that f. o. b?

A. That is f. o. b. plant.

Q. Did you quote him at all on the Billy B. Van fruit bar, which is listed there in 1942, which you later sold to him?

A. That bar was promoted by another individual and I manufactured it for him, and he sold it.

Q. Did you quote him in this conversation?

A. No, I didn't quote him on that Billy B. Van at all.

Q. When did you quote him on the Billy B. Van bar?

A. I personally did not quote him on that bar. My agent took care of that.

Q. Did he want to buy f. o. b. factory?

A. Yes, he wanted by buy f. o. b. factory.

Q. State whether or not he named f. o. b. factory as one of the reasons why he should have a reduction in price?

Mr. Gravelle: I wonder if we might have that question read back, if your Honor please?

Trial Examiner Bayly: Yes, will you read it, please?

(Question read.)

Mr. Gravelle: Your Honor, I object, because there is no testimony, as far as I know, that Mr. Boid asked for a reduction in price.

Mr. Forkner: The question states whether or not, your Honor.

Trial Examiner Bayly: I think there was an indication he had sold at \$2.35 and this was \$2.25 as I remember; is that correct?

Mr. Forkner: That is correct.

Trial Examiner Bayly: He may answer.

The Witness: Well, we grant that concession to a lot of other purchasers; I mean, we do have that practice, do have a practice on shipping merchandise f. o. b. to our customers, and that could have been the reason for the \$2.25 price.

Q. I don't quite understand that. Will you explain? [fol. 194] A. On the basis—that package there weighed 11 pounds.

Q. What is that, \$2.25?

A. \$2.25. In making up our costs we allow a cent a pound for shipping. That is how we formulate the prices. We weigh the package, and if it weighs so much, it costs so much to ship it from a certain given point, and we average it out. We claim, the way we ship is a cent a pound. We usually ship to two or three states the other side of the Mississippi by rail and that is what it averages out.

JOHN H. O'MEARA, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Forkner:

Q. Your name is John H. O'Meara?

A. Yes, sir.

Q. What is your address?

A. 72-72 112th Street, Forest Hills, New York.

Q. And what position have you occupied with the Charms Sales Company?

A. Salesman.

Q. And how long have you been a salesman for them?

A. About ten years.

• • • • •  
Q. Did you have a talk with Mr. Boyd at some hotel in regard to the sale of Tasty Yeast?

A. Yes. That might have been in 1941 or 1942. It was either in the Roosevelt or the Biltmore Hotel. Ralph Boyd was here from Chicago and George Pratt.

Q. And who else was there at that conference?

A. Mr. Reid who was the owner and president of the Charms Company was also present.

Q. Now will you describe in your own words the substance of the conversation?

A. Well, of course it was always the same thing. The goods we had didn't vend, you see. So Ralph Boyd said to Mr. Reid, well, why couldn't he get up a bar for about [fol. 195] a cent and a half apiece that would vend, some kind of a bar that would vend, and Mr. Reid said that we couldn't afford to make a bar at any such price as that.

We couldn't afford to make a bar at any such price as that. That the cost didn't permit it.

So Ralph said, "Well, you don't have to put him in on any of it. That would eliminate that."

And Mr. Reid said simply, "No, that wouldn't work out."

Q. Who was he referring to when he said "eliminate him?"

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A. He was referring to me. But I want to go on record on that that my setup with the Charms Company is not based on any commission any way. It was based on a salary basis at that time.

So that didn't mean anything one way or the other.

Q. State whether or not he was suggesting that salesmen's commission be eliminated from the price?

A. It would be eliminated from the cost of it. But it didn't make any difference because there was no commission in it.

Q. Now state whether or not in any conversations you had with Ralph Boyd you quoted to him the price at which you sold your candy to others using the 100 count or the 24 count?

Mr. Howry: If your Honor please, I object to that question for the reason that the witness has not testified that he had any other conversations with Ralph Boyd. In fact, he has testified that he did not have except this one. I object to the question upon that ground.

Trial Examiner Bayly: Mr. Forkner, in view of that objection of course there is a lot of correspondence here from and to Mr. Boyd should you not ask the witness whether or not he had any further conversations with Mr. Boyd on price, terms or conditions or the quality of the product, or anything of that kind as a foundation, and that I think would meet the objection raised by Mr. Howry.

By Mr. Forkner:

Q. Now, Mr. O'Meara, did you have any other conversations with Mr. Boyd?

A. After that conversation?

Q. Yes, or before.

[fol. 196] A. I might have seen him once or twice after that. I am not sure whether it was here in New York. I might have gone into Chicago once or twice, but it was more of a personal call than it was anything else.

Q. Can you state whether or not Mr. Boyd in any of these conversations you mentioned had asked you for a lower price on your products?

A. No, because we had nothing. There wasn't any goods there. The goods didn't vend.

Q. Well now, can you state whether or not Mr. Boyd indicated to you that he wanted to buy the 100 count candy?

A. Not particularly because it came back to always the same thing. The goods didn't vend.

Q. Now did you quote him your 24 count price when you talked to him?

A. Yes.

Q. What was the price you quoted?

A. Whatever the price was at the time. I don't remember what those prices were.

**Trial Examiner Bayly:** The question is when you were talking with Mr. Boyd were you discussing prices and terms?

**The Witness:** No. The goods didn't vend so there was no—the only thing about the price was the one remark that he made about making him up that bar and saving my commission out of it.

HARRY HECHT was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give your full name and address, Mr. Hecht?

A. Harry Hecht, 5312 Snyder Avenue, Brooklyn.

Q. What is your occupation?

A. Salesman at the present time, ladies apparel line.

Q. And were you formerly with the Chocolat Menier Company of Hoboken, New Jersey?

[fol. 197] A. I was.

Q. And in what capacity?

A. Salesman.

Q. And did you contact the Automatic Canteen Company of America in connection with selling your products of this company? Can you state about what year it was?

A. That I contacted the Canteen Company you mean?

Q. Yes.

A. About 1940 or 1941.

Q. Was that before any sales had been made by the Chocolat-Menier Company to the Automatic Canteen Company of America?

A. That's right.

Q. Whom did you talk to in that connection?

A. With Mr. Boyd of Chicago.

Q. Did anyone go with you from the Chocolat-Menier Company?

A. Mr. Moser did.

Q. Who is Mr. Moser?

A. Sales Manager at the time I went there.

Q. Is he still connected with the company?

A. He is, yes.

Q. Did you quote Mr. Boyd your price when you saw him?

A. I did.

Q. About what was the price at that time for the 30 count?

Mr. Howry: If Your Honor please, I object to that question. What was the general price is not pertinent here. The price he quoted might have been.

Mr. Forkner: That is what I am asking him.

By Mr. Forkner:

Q. What price did you quote him?

A. I really don't recall at that particular time.

Q. What did Mr. Boyd tell you in substance in regard to the price which you did quote to him?

Mr. Howry: If Your Honor please, I object. The Witness just testified that he didn't quote him any price at the time.

Trial Examiner Bayly: What was said and done there with reference to dickering for price, anything that you can remember, in substance is what we want?

Mr. Forkner: Just a moment here.

[fol. 198] By Mr. Forkner:

Q. Did you give him a price on the 30 count when you talked to him?

A. Yes.

Q. And you are definite on that?

A. All right.

Q. Now what did he say as to the price you quoted to him in substance?

A. That it didn't fit into his picture, it was too high for him, and if we were in a position to pack it for him according to his way—in other words; we were packing it in 30 and if we could pack it in a 100 count and the price would probably come down a bit, he would use the merchandise.

Q. In other words, he wanted the 100 count for what reason?

A. So that it would bring the price down a little cheaper to fit in his scheme of things.

Q. What did you say or Mr. Moser say in response to that at the time?

A. I think we told him we would let him know at the time.

Q. Was there anything else said about any other factors that you should consider in regard to making a price to the Automatic Canteen Company on the products?

A. No, sir.

Q. Did you later let him know about the 100 count?

A. We did.

Q. What did they say as to that?

A. We couldn't meet his price, I mean it was out of the question.

Q. What did he tell you at that time?

A. I really don't remember what is/was, the actual conversation.

Q. Were you present with Mr. Moser when you made the recall or recontact?

A. I really don't remember.

Q. Who was Mr. Boyd at that time?

A. Mr. Boyd I think was the purchasing agent for the Canteen Company of America.

[fol. 199] PAUL FREDERICK MOSER was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you state your full name and address?

A. Paul Frederick Moser, 3337 Hudson Avenue, Union City, New Jersey.

Q. Will you tell us how long the Chocolat-Minier Company has been in business and whether it has any foreign connections?

A. To my mind Chocolat-Minier was established in France in 1816. They have been doing business in the United States since the late 60's, I believe.

Q. And did you go with Mr. Harry Hecht to Chicago to see the Automatic Canteen Company?

A. I did see Mr. Boyd in Chicago.

Q. And what was the purpose of your visit?

A. To establish the contact. It was an attempt to do business with Canteen.

Q. About what year was that?

A. I should say about 1941, the fall of 1941.

Q. And at that time were you making a 30 count piece of goods?

A. We did.

Q. Did you quote the price of that 30 count to Mr. Boyd?

A. We did quote the 30 count price to Mr. Boyd.

Q. Can you recall what that price was about?

A. The same price as we would quote to everybody, to every concessionnaire or newsstand operator.

Q. Did you tell him that?

A. I did.

Q. State whether or not Mr. Boyd made any objections to the price?

A. He told us very frankly that our price would not fit into his picture because it was too high.

Q. State whether or not there was any discussion about a different size count?

A. Mr. Boyd asked us if we could possibly pack a 100 count.

Q. Did he state any reasons why he wanted a 100 count? [fol. 200] A. He told us that this was the standard pack supplied by other manufacturers to Canteen and the purpose of that was to obtain additional savings.

Q. What do you mean by savings?

A. The cost of packing the supplies.

Q. You mean a lower price?

A. A lower price.

SAMUEL E. RICH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you state your full name and address?

A. Samuel E. Rich, 265 Cabrini Boulevard, New York City.

Q. What company are you associated with?

A. Sweets Company of America, sales manager.

Trial Examiner Bayly: We will take a short recess at this time.

(A short recess was taken.)

By Mr. Forkner:

- Q. What is your position with the company?  
A. I am the sales manager of the candy division.  
Q. Of Sweets and Company of America?  
A. Of Sweets and Company of America, Inc.  
Q. How long have you been sales manager?  
A. Since 1942.

THOMAS A. KERR was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

Direct examination.

Mr. Forkner: I ask the reporter to mark these Exhibits as Commission's Exhibits 145-A to U inclusive and 146-A to I inclusive for identification.

[fol. 201] By Mr. Forkner:

- Q. Will you please state your full name and address?  
A. Thomas A. Kerr, Englishtown Road, Jamesburg, New Jersey.  
Q. Are you the president of Kerr's Butter Scotch, Inc.?  
A. No, I am the treasurer and general manager.  
Q. And are you part owner?  
A. I own stock in the company, the corporation.  
Q. And how long have you been connected with this company?  
A. Thirteen years.  
Q. And are you in charge of sales?  
A. I am.

Q. Why did you deal with Mr. Boyd? What was his position with the Company?

A. Mr. Boyd was the man to see to get on the Auto

matic Canteen Company's list which they sent to their distributors of available candy, I suppose.

Q. Was he the buyer?

A. To the best of my recollection—

Trial Examiner Bayly: (Interposing.) Isn't that pretty well established that he was a buyer?

Mr. Forkner: Well, it is evidence the other way, too, Your Honor.

Mr. Howry: There is no evidence the other way. There is evidence that he was the assistant buyer.

ROBERT F. T. GUNDLACH was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

Direct Examination.

By Mr. Forkner:

Q. Will you please state your name and address?

A. Robert F. T. Gundlach, 77 Prospect Street, Summit, New Jersey.

Q. What is your connection with your company?

A. I am the vice-president of the company.

Q. What is the name of your company?

A. The Terry Candy Company of New Jersey.

Q. How long have you been associated with the company? [fol. 202] A. It is over twelve years, Mr. Forkner, that I have been associated with the company. I am not sure but I know it is over twelve years.

Q. Have you had any contacts with the Automatic Canteen Company of America?

A. Yes, sir.

Q. Have you sold them candy for a period of time since 1939?

A. That's right.

Q. What has been your relationship—have you had any financial connections other than the sale of candy?

A. Yes, sir.

Q. There has been money loaned?

A. Canteen has lent us money; They lent us as high as \$100,000.

Q. And that has been paid back?

A. That has been paid back.

Q. In your billing have you always billed the Automatic Canteen Company of America?

A. Yes, they are the only one.

Q. Have you contacted any distributors?

A. No, sir.

Q. Have you ever had distributors write in who wanted to buy from you?

A. No, I don't think so.

Q. Now with whom did you make arrangements to sell to the Automatic Canteen Company?

A. Mr. Boyd.

Q. Who was he with the respondent?

A. I thought he was the buyer for Canteen. His title was secretary, I think.

Q. Now when you talked to him you made a 100 count candy previous to that?

A. No.

Q. And after you talked to him did you start making a 100 count?

A. Yes.

Q. Was that in 1939?

A. That was the fall of 1939.

Q. Where was it, Chicago?

A. There was one telephone call with Chicago and then I saw Mr. Boyd, I think, in the Roosevelt Hotel in New York.

Q. Now in these conversations—that is, before you under-[fol. 203] stand you started selling—did you give him your price on 24 count that you had at that time?

A. Yes.

Q. What was that price in 1929?

A. I think it was 60¢ for 24's back in 1929.

Q. What response did you get from him on that price of 24's?

A. Mr. Boyd said that they were used to buying a 100 count and there were some savings on 100 count, and he

wanted to know if we could repack. We gave him a price on 100 count.

That was the first we ever sold on 100 count.

Q: That was after you quoted the 24 count price to him?

A. Yes. I think he said that he wasn't interested in 24 count merchandise, that they bought all 100 count merchandise. It was quite a while back.

Q. Now on this 60¢ price on 24 count, was that a delivered price?

A. Yes, that was delivered.

Q. Now in connection with this conversation, did he mention whether he wanted f.o.b. or the delivered price?

A. He said he would like an f.o.b. price, either that or an average freight rate delivered to the various branches.

Q. Did he give you any reasons for wanting that?

A. For wanting an f. o. b. price?

Q. Yes.

A. Well, the only one I can remember is that he thought naturally we would charge him a little higher than the average because we wouldn't know where it was going to go. That is always, I think—I know that is in our case if we had several points to deliver to and we didn't know how much—what percentage was going to go to the different points we would have to protect ourselves and charge a little more than normally you might on an f. o. b. price.

Q. Was this in a personal conversation that these things were all mentioned or was this over the telephone?

A. I think it was by a letter, but there were conversations and a telephone conversation and I think we also talked to Mr. Boyd in New York.

Q. What was the substance of the conversation in New York?

A. Well, that he liked the item and he thought it had possibilities in the machine.

[fol. 204] Q. Of course you were making 24 counts?

A. That's right.

Q. And delivered?

A. But Mr. Boyd said the machine would determine that by itself, that the machine was the sole judge.

Q. Was there any mention of any other factors by Mr. Boyd in these conversations as to why they should have a lower price?

A. Well, they never asked for a lower price. They asked for the savings in packing 100 count wherein there was a definite saving.

Q. That would make the price lower?

A. Yes, it would make the price lower.

Q. And lower than that at which you sold to others?

A. No, no.

Q. Now when you got this subpoena to bring in certain materials did you contact counsel for the respondent immediately?

A. Yes, I did. I called up Mr. Gravelle and I asked him what it was about and he told me. He offered me no advice. He just told me what it was about.

Q. And you hadn't made 100 count before you sold 100 count to Automatic Canteen?

A. That was the first we made.

Q. And you always had a delivered price before on 24 count?

A. Yes, I think so, I think so. Some of the chains may have bought f. o. b., but I think so.

Q. Now do you sell this 100 count to anyone that wanted to buy it?

A. Yes, Mr. Forkner. The minute we made a 100 count pack we would sell it to anyone.

Mr. Forkner: Your Honor, at this time I am calling Mr. Gleeson of Hawley & Hoops of New York City adversely.

Trial Examiner Bayly: Mr. Reporter, this is Mr. Charles E. Gleeson, 271 Mulberry Street, New York City.

[fol. 205] CHARLES L. GLEESON was thereupon called as a witness for the Commission and, having first been duly sworn testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you please state your full name and address?

A. Charles L. Gleeson, 271 Mulberry Street, New York.

Q. Is that the business address?

A. That is the business address.

Q. What is your position with Hawley & Hoops?

A. I am a salesman.

Q. And in connection with that what type of accounts do you handle?

A. I handle the chain stores and department stores.

Q. And how long have you been with Hawley and Hoops?

A. Approximately ten years.

Q. About what year did you start with Hawley & Hoops approximately?

Q. Do you recall that you told me at that time that you quoted him the 24 count size price when you first talked to Mr. Boyd?

A. Well, not when I first——

Q. (Interposing.) A little later?

A. A little later maybe it was.

Q. You told me that; is that right?

A. I think I did.

Q. And you also told me that he wanted the 100 count size?

Mr. Howry: If Your Honor please, I object to the question and I object to this type of examination unless you fix the dates. You are questioning him about conversations that took place back in 1937 and 1938, and he has told you to the best of his knowledge what he knows about them.

Now if you are going to take up another conversation you should give the witness the date and not press him that way.

Mr. Gravelle: I wonder, Your Honor, if the witness' at-

torney shouldn't be here and let him go over until this afternoon to let him testify.

[fol. 206] Trial Examiner Bayly: If he wants his attorney here he can have him, but we will proceed.

Mr. Gravelle: It seems to be a rather unusual procedure to me wherein Mr. Forkner is trying to impeach his witness.

Mr. Forkner: I called him adversely.

Trial Examiner Bayly: Proceed.

By Mr. Forkner:

Q. A moment ago you told me, I think, that you had talked to Mr. Boyd among these first conversations that you had a 24 count and you gave him a price of 64¢. Do you remember telling me that and Mr. Argus the other day in one of these conversations?

A. If you got it there I must have told you that, you see.

Q. If that was told to us at that time—

Mr. Howry (Interposing): If Your Honor please, I object to that.

Mr. Forkner: Just a minute.

Mr. Howry: I have got a right to object, Mr. Forkner. I object to that method of examining this witness. He is compelling the witness to make statements which he doesn't know of his own knowledge. He says to Mr. Forkner if he has got it there and Mr. Forkner hasn't got it,

Let us have an orderly examination of witnesses.

Trial Examiner Bayly: Objection overruled. Proceed.

Mr. Forkner: Read the last question.

(The reporter read the question as follows:

"Q. If that was told to us at that time—")

By Mr. Forkner:

Q. If that was told to us the other day and you recall that, was that statement true that you had told him that your 24 count price was 64¢ among the first conversations?

A. Well, whatever I told him was the truth, and I am trying to get in to you that we were so far away from packing and price that we didn't go into any detail at all. He knew nothing about our products, nothing, absolutely nothing, and there wasn't any mystery about our prices.

It is a matter of record, and if he asked me, and I told you that he asked me, I can't see that there is anything out of order in that. We only had one price and he wasn't interested in price at that time at all.

[fol. 207] He seemed to be interested in whether we could get together on certain mixtures that would be acceptable to his distributors, see.

Q. Let me ask you another question. I think I asked you this the other day, whether or not you talked to Mr. Boyd on these several occasions that you have testified to that you asked him or he asked you if you didn't have a 100 count pack instead of a 24 count pack.

Can you recall what your answer was then and what the truth is now?

A. I should have told you if I didn't tell you that we were not interested in any other pack at that time but a 24 count, see.

Q. What I am getting at is what he said to you and not what you were interested in. I would like to have you answer what he said and not what you were interested in.

Mr. Forkner: Read the question.

Mr. Howry: If your Honor Please, I wonder if I could see Commission's Exhibit 151 for identification?

Trial Examiner Bayly: Very well. Read the question.

(The reporter read the question as follows:

"Q. Let me ask you another question. I think I asked you this the other day, whether or not you talked to Mr. Boyd on these several occasions that you have testified to that you asked him or he asked you if you didn't have a 100 count pack instead of 24 count pack.

Can you recall what your answer was then and what the truth is now?"

Mr. Howry: If Your Honor please, I object to that question as being very improperly phrased. If he wants to ask this witness a question, have him ask him, but not have him refer to some star chamber conversation that they had outside a court room and ask if that was true.

Trial Examiner Bayly: Well now, we are getting into a lot of bombastic remarks here about star chamber sessions. I am instructing this witness to disregard any

referenced to any prior conversation and to simply answer these questions giving your present best recollection as to substantially what happened at a given time.

Now, Mr. Forkner, we are going to sustain this objection and ask you to ask the witness another question as simply and as directly as you can.

{fol. 208} By Mr. Forkner:

Q. Mr. Gleeson, in these conversations that you had with Mr. Boyd prior to the time you sold him back there after you came to work with Hawley & Hoops, did Mr. Boyd at any time ask you if you—

A. (Interposing.) Prior to the time I came to work for Hawley & Hoops, what do you mean by that?

Mr. Forkner: Read the question.

(The reporter read the question as follows:

"Q. Mr. Gleeson, in these conversations that you had with Mr. Boyd prior to the time you sold him back there after you came to work with Hawley & Hoops, did Mr. Boyd at any time ask if you—")

By Mr. Forkner:

Q. (Continuing.) —if you had a 100 count pack instead of a 24 count pack?

A. Well, I would answer that today forgetting what we said at your hotel chamber, if he did, it is possible that is what he had on his mind. But we got nowheres near—and I have to repeat this thing—

Trial Examiner Bayly: (Interposing.) Don't repeat it. Did you discuss a 100 count pack?

The Witness: No, there wasn't any discussion, Your Honor, whatsoever at all. It might have been mentioned just incidentally, I just don't recall. I could see he wasn't interested in our particular type of merchandise.

By Mr. Forkner:

Q. Now later he did become interested in your merchandise, did he not?

A. He didn't become interested in this merchandise.. He

referred me—you have the letter right before you, I think, Mr. Counsel.

Trial Examiner Bayly: Just one minute here. We don't want to have a lot of verbiage here. Did you later make sales?

The Witness: I did, Your Honor.

By Mr. Forkner:

Q. Who did you have those negotiations with?

A. With Mr. Pratt.

Q. And in what year were those negotiations?

A. Well, they started in 1943.

[fol. 209] Q. And you talked to Mr. Pratt then?

A. Yes.

Q. Now did Mr. Pratt ask you anything about a 100 count?

A. He did not.

Q. Did he ask you anything about f. o. b. and delivered price?

A. Nothing.

Q. He just asked you for merchandise?

A. He wanted merchandise.

Q. That was in 1943?

A. That is when we started.

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CLARENCE H. FLINT, was thereupon called as a witness for the Commission and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Would you give the reporter your full name and permanent address?

A. Clarence H. Flint, Fairgrounds Road, Woodbridge, Conn.

Q. And you have been connected with the Peter Paul, Inc., Co., at Naugatuck, Connecticut?

A. Yes.

Q. And how long have you been connected with them?

A. Since 1930.

Q. Now, Mr. Flint, prior to your first sales to the Automatic Canteen Company of America in 1941 or 1939 and after 1936, did you have any contacts with the officials of Automatic in connection with the prospective sales which were made generally?

A. There were some contacts. They called on us in Nangatuck.

Q. And do you happen to recall the names of any of the gentlemen who called on you?

A. A Mr. Anderson and a Mr. Swanson about that period, 1939, 1940 or 1941.

[fol. 210] Q. Do you recall the name of Boyd?

A. Boyd, yes.

The Witness: As far as Mr. Boyd is concerned, I think his visit there was purely just a sort of a handshake or a social visit. But the visit of Mr. Anderson and Mr. Swanson was to come to see us, particularly to see if we could work out certain special packs for them.

And by so doing they endeavored to show that certain savings would be effected and would be a consequential saving to them in their delivered price. So the whole purpose of their visit was to put the proposition to us to see if we couldn't make up certain assortments, special packs of our bars, and to determine a price which would be more favorable to them.

By Mr. Forkner:

Q. Now when you talked to them, did you tell them the price of your 24 count bar being 64¢ at that time?

A. Yes, yes.

Q. And did you have any other bar to quote them or pack size, I mean, other than the 24 at that time?

A. No, we had no other pack.

(The reporter read the question as follows:

"Q. Did either Mr. Anderson or Mr. Swanson state in substance that they wanted a lower price than you were then selling the bar per bar?"

The Witness: That was the whole purpose in coming to see us.

By Mr. Forkner:

Q. You mean by that that they stated that to you that they wanted a lower price?

A. They were seeking a lower price on our regular pack, 24 count pack price.

Q. Will you enumerate whether or not among the factors that they might have mentioned in discussion with you was included any of the following: First, a possibility of buying a 100 count size instead of a 24 count size which would result in a lower price to them?

A. Yes.

[fol. 211] Q. Second, buying f. o. b. factory instead of having a delivered price on their candy?

A. Yes.

Q. Third, a lower price resulting from the fact that salesmen didn't need to call upon them and they would send orders in without salesman's expenses?

A. You mean by the elimination of salesmen's expenses?

Q. Yes.

A. Surely.

Q. Fourth, was there anything said about savings resulting from the fact that they would not return stale or unsalable candy or eliminate the necessity of having candy returned?

A. Yes, that is an old argument that we get from large organizations;

Q. And specifically was that among the matters which were discussed by these two gentlemen?

A. As I recall it, yes.

Q. According to your best memory?

A. According to my best memory.

Q. Now did they speak about the advantages of advertising or distribution and the number of outlets that they

had; and the prospects of volume if you were able to sell your candy to them?

A. I would say so, yes. That was part of the argument.

Q. And did they mention anything about the fact that you didn't need to give them any free deals or discount deals as you gave to other customers and to jobbers, and therefore you could take that into consideration and reduce the price again?

A. Well, we have no free deals to any jobbers during that period.

Q. I understand that. Did they go over any of these items?

A. Well, I am sure that all those points were touched upon because if we had been giving deals that would be equivalent to a lower price. And prior to 1932 we did have free deals to our wholesalers, but we didn't have it after that time.

Q. You didn't have it after 1936?

A. We didn't have it after 1932.

Q. We are only interested in 1936. All of those things were either discussed or mentioned to you by either Mr. [fol. 212] Anderson or Mr. Swanson in one conference or two conferences?

A. There were several conferences. I know they were there several times. I don't know that I can tell you the exact time of the year that they were there.

Trial Examiner Bayly: Objection overruled. You may answer. Is there anything that you can think of in connection with the dealings with representatives of the respondent that you have not testified to as yet?

The Witness: I think, Your Honor, that covers it very well. The contracts which we had, particularly with Mr. Anderson and Mr. Swanson were about getting special prices, getting special preference over other regular distributors and ways and means were proposed to us as to how it might be done, and I don't know as I can add anything to that.

Trial Examiner Bayly: Very well. Are there any further questions, Mr. Forkner?

Mr. Forkner: At this time, Your Honor, I would like to call to the stand Mr. Harry Kenneth Philips, of the Lamont, Corliss & Company adversely.

Trial Examiner Gayly: Mr. Reporter, this is Mr. Harry Kenneth Philips, 151 Hawthorne Avenue, Glen Ridge, New Jersey.

HARRY KENNETH PHILIPS, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Forkner.*

Q. Would you give your full name and personal address, Mr. Philips, to the reporter?

A. Harry Kenneth Philips, 151 Hawthorne Avenue, Glen Ridge, New Jersey.

Q. What position do you occupy with the Lamont, Corliss & Company?

A. Manager of Chocolate Bar Sales.

Q. And how long have you been in charge of that?

A. About ten years.

[vol. 213] EDWARD DENT LANE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Forkner.*

Q. Will you give your full name and address to the reporter?

A. Edward Dent Lane, 37 Washington Square West, New York City.

Q. And your position with the company at the present time is sales promotional manager?

A. Yes.

Q. And you were formerly field manager?

A. That's right.

Q. And were you the man who contacted and had con-

tacts with the Automatic Vending Company at Chicago in connection with proposed sales to be made to them?

A. That's right.

Q. And will you tell us who you talked with?

A. Mr. Ralph Boyd.

Q. And where did you talk to him?

A. In Chicago.

Q. And what position did he occupy with the respondent company?

A. Purchasing agent.

Q. And did you quote the 24-count, 65 cents, to him, at the beginning of your conversation?

A. That's right.

Q. Tell us in substance what Mr. Boyd said in regard to your price and count in substance as you best remember it.

A. Well, he said that they were not interested in 24-count; that they were interested in the larger pack with the lower price on an f. o. b. basis. If we expected to do business with him, we would have to give them a better price than our established 24-count price.

Then he went on to point out or make several suggestions as to how we could arrive at a lower price, including the question of f. o. b., the elimination of sales expense in making contacts, the economy in packaging, the economy in the elimination of free goods deals, the economy in advertising material, and maybe one or two others, but I recall them.

Q. Did he say anything about volume or the distribution that might be gained?

A. Well, the advertising value resulting from their distribution.

Q. Did he mention anything about the savings that might result from the elimination of returns from stale or unsalable candy?

Q. Can you think of any other items which he might have mentioned where he could save money and give a lower price?

A. I think I covered everything.

Q. How did the conversation end during that conference? Did you tell him you could do that or not?

A. I told him all I could do was to take it up with our people and I would let him know if it were possible.

Q. Did he do that?

A. Yes, sir.

Q. Or did you do that, I mean?

A. Yes.

Q. And who did you take that up with?

A. Mr. Philips.

Q. Mr. Philips?

A. Yes.

Q. And was that report, as you remember it, verbally or in writing?

A. Verbal.

Q. Was it in person or by long distance telephone?

A. It was in person.

Q. And did you relate to him your contact and what had been said to you as to the lower price desired to Mr. Philips?

A. That's right.

Q. What instructions, if any, did you receive from Mr. Philips in regard to Mr. Boyd's request for a lower price?

A. Well as I recall it, we worked out a lower price and submitted it to Mr. Boyd.

Q. Now, you say "we submitted it." Did you submit it personally to Mr. Boyd?

A. I did, yes.

Q. You made another trip over to Chicago?

A. That's right.

[fol. 215] Q. And when you got there what did Mr. Boyd say in response to the new price?

A. He said, "It is still too high."

Q. And what was the price you were quoting him then?

A. I don't recall offhand.

Q. Was it in a hundred count?

A. Yes.

Q. Because that is the way they wanted you to quote it?

A. Yes.

Q. But it was billed too high?

A. Yes.

Q. Did he go over again some of these same factors in

substance, some of them, in this new conversation when you submitted the price to him?

A. It was principally repetition.

Q. Repetitious?

A. Yes.

Q. Was anybody else present?

A. No.

Q. What did you tell him then when he said it was too high? Did you tell him you were going to report back again?

A. I told him naturally I was disappointed, and I would report back and see what we could do, if anything.

Q. Did you report back?

A. I did.

Q. And who did you report to?

A. Mr. Philips.

Q. And what did Mr. Philips instruct you, if anything, to do in regard to Mr. Boyd's refusal to accept the price submitted to him, which was also lower than the price you sold to others?

A. I don't know that I got that.

Mr. Forkner: Mr. Reporter, delete the last part of the sentence with the permission of the Court. The question is sufficient without that. Read it without the last part, and I will tell you where to stop.

Trial Examiner Bayly: Strike out starting from "which was also lower than the price you sold to others." That will take care of any objection you might have; is that right?

Mr. Howry: That's right.

[fol. 216] By Mr. Forkner:

Q. Will you answer the question, please?

A. My recollection is that we worked out a slightly lower price than the first one submitted.

Q. What factors did you consider most prominently in refiguring the second time, if you can recall it?

A. That would be up to him to answer because I had no part in working out the price.

Q. Now, did you submit this second proposal to Mr. Boyd?

A. I did.

Q. And was Mr. Boyd the only one you submitted it to of the respondent firm?

A. That's right.

Q. And what did Mr. Boyd say?

A. He said that he would place a small order.

Q. A small order?

A. That's right.

Q. And did he place a small order?

A. He did.

By Mr. Forkner:

Q. Now, Mr. Philips you heard the testimony as given by Mr. Lane herein in regard to his conversations had and offers made to Mr. Boyd, have you not?

A. Yes, sir.

Q. Will you state for the record whether Mr. Lane reported in substance all of the factors which he mentioned here in his testimony to you on those different occasions when he reported back to you as his superior?

Trial Examiner Bayly: The Trial Examiner overrules the objection and permits it on the ground that it shortens the necessity of Mr. Philips restating that; that he gives his present recollection in substance of what was told to him as a result of these negotiations as testified here by Mr. Lane.

It does not reflect on Mr. Lane, and it does not reflect on anybody. It just shortens up the oral testimony.

By Mr. Forkner:

Q. Will you answer the question now, Mr. Philips?

A. The answer is yes. I seem to recall one other saying [fol. 217] being mentioned which was credit. I think that item was discussed at that time.

Q. What do you mean by credit?

A. Limiting the credit risks.

Q. You mean the payment of bills?

A. That's correct.

Q. Was that mentioned to you by Mr. Lane as being mentioned to him?

A. As one of the savings, that's right.

Q. As mentioned to you by whom?

A. Mr. Lane on reporting to me.

Q. On conversations with Mr. Boyd?

A. That's right.

*Cross-Examination by Mr. Gravelle.*

Q. Mr. Philips, as I understand it, you were not present at any of these conversations with Mr. Boyd?

A. That's correct.

Q. And your testimony is entirely hearsay as to what Mr. Lane told you?

A. That's correct.

Mr. Forkner: Yes, Your Honor, I call Mr. Wallace J. Schmidt of Mason, Au & Magenheimer Confectionery Manufacturing Company of Brooklyn, New York, adversely.

Trial Examiner Bayly: Mr. Reporter, this is Mr. Wallace J. Schmidt, 2 Henry Street, West Hempstead, Long Island.

WALLACE J. SCHMIDT was thereupon called as a witness for the Commission and, having first been duly sworn, testified as follows:

*Direct Examination by Mr. Forkner.*

Q. Will you please state your name and address?

A. Wallace J. Schmidt, 2 Henry Street, West Hempstead, Long Island.

Q. How long have you been sales manager of this company?

A. Oh, for about 25 years.

[fol. 218] Q. Now the change in price, when you negotiated in regard to the change in price; give in substance what was said?

A. That \$1.95 was only on one item so far as I remember on Black Crows which cost us less and which they didn't want to buy because it was small pieces, and we were trying to get them to handle it in their machines.

But the other items, as far as I can remember, were all \$2 because they were buyers and we understood when we first started to make goods for them that the price was to range from \$2 to \$2.20. And we made goods for them at that price. The prices were f. o. b. New York and f. o. b. Chicago. To the intermediate points they paid the freight.

Q. What do you mean by you understood. Did they tell you that?

A. As far as I remember in the course of conversation they said we can afford to pay between \$2 and \$2.20 for 100 count goods. I am quite sure they also told us they would prefer to have \$2 goods.

Q. Did he give you any reasons why you might be able to sell them at that price?

A. Of course, I have heard what has been going on and I can truthfully say that they never made any demands on us about you don't have any selling expense, or you don't have this and that. As far as I know in all my negotiations with them at the start there was the price.

If you make goods for us we can give you some nice business and we needed business.

Q. You mean at that price, within that price range?

A. Yes. All goods were cheap.

Q. What was your 24 count selling for?

A. I would say our list price on Black Crow was 60c for 24's, but there were plenty and plenty of dealings.

Mr. Gravelle: 64?

The Witness: 60¢ on Black Crows.

By Mr. Rorkner:

Q. Did they lower your price on 24 count to 60¢ or did you tell them?

A. There are no secrets in this candy business. You

should go over and try to sell fellows in New York. They knew everything that went on.

[fol. 219] Q. All buyers know prices, then?

A. I would say so.

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Mr. Forkner: I wish to recall to the stand, SAMUEL E. RICH, sales manager of the Sweets Candy of America, and as before, adversely.

Further redirect examination.

By Mr. Forkner:

Q. Did you have any deals after the beginning of January 1942 when the war began and supplies became scarce?

A. We did not have any deals in 1942.

Q. Your deals were previous to that?

A. Prior to the year 1942.

Q. Now tell us the type of deals you had, were they consumer deals, retailer deals, or salesmen premium deals?

A. They were retail deals, or retailer deals, salesmen deals and jobbing deals.

Q. Tell us about your retailer deals.

A. In one instance we packed sun glasses in our boxes of 5¢ Tootsie Rolls. In another instance we packed three additional packages of 5¢ Tootsie Caramels in the boxes of 5¢ Tootsie Rolls. They were retailer deals.

Q. For what period of time were they open?

A. For a period of time from approximately six weeks to two months.

Q. And whom were they offered to?

A. The deals were offered to the jobbing trade and the jobbers, through their salesmen, in turn offered that to the retail trade.

Q. What was the value of these glasses, sun glasses?

A. The value of the glasses in the quantities which we purchased which were large quantities was approximately 5¢ a pair.

Q. Now did you give the jobbers or the retailers a choice of having an equivalent discount in lieu of the premium on glasses or in lieu of the free goods?

A. There was no choice of any discount, sir. It was one deal.

Q. Now didn't you have many requests to give them [fol. 220] the discount in lieu of these sun glasses and in lieu of these free goods?

A. To the best of my knowledge we had no requests for a discount in lieu of the premium.

Q. You didn't offer it to them?

A. We did not offer them other than the deal as stated.

Q. Now tell me about your sales premium deals.

A. Jobber salesmen deals.

Q. Tell us about that?

A. There were times when we offered shirts, handkerchiefs, silverware.

Q. For selling so much merchandise?

A. Not for selling, sir. If the jobber purchased a certain quantity of merchandise he was entitled to premiums such as mentioned.

Q. Were they given a choice then of having an equivalent discount to the value of those?

A. There was no choice given to them.

Q. Now the third one is jobber deals.

A. The jobber deal represented boxes free with the purchase of a certain number of boxes.

Q. Was the jobber given a choice of having an equivalent discount if he so desired instead of taking that free goods?

A. They were not, sir.

Q. What were the free goods on items which were not as salable as other items?

A. The free goods were on items that were in high demand.

Q. In other words, that had public acceptance?

A. Very much so. They were on Tootsie Rolls.

Q. Now what period of time did you have that? Limited periods?

A. Our deals ranged for a period of approximately six to eight weeks.

Q. Were these deals offered to any competing vending machine operators competing with the Automatic Canteen Company of America who happened to be customers of yours?

A. The deals were offered to the jobbing trade to the best of my belief.

Q. Now were these 100 count at these prices offered to other vending machine operators when you sold to the Automatic Canteen Company of America?

[fol. 221] A. To the best of my belief they were not offered to any other vending machine operators.

Q. In other words, they couldn't purchase the 100 count at the same price that you sold to Automatic?

A. Well, to the best of my belief they were not offered to them.

D. L. Wright was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Forkner.

Q. Would you give your full name and your personal address to the reporter, Mr. Wright?

A. David L. Wright, 510 South Broad Street, Lititz, Pennsylvania.

Q. What is your position with the Wilbur-Suehard Chocolate Company?

A. Assistant sales manager.

By Mr. Forkner:

Q. Will you give the substance of those negotiations, or conferences, as reported to you by your salesman?

A. The reports were to the effect that quotations and prices as submitted were duly made, and were not accepted by the organization. The reasons:

That we didn't have enough consumer acceptance at the time and on the question of price.

Q. What do you mean by a question of price?

A. Well, a lower price.

Q. Than you sold to others?

A. Oh, no, just a lower price. We didn't sell to others.

Q. I mean, do you mean there was a request for a lower price?

A. Yes, sir.

Q. Can you state whether or not prices that were quoted to the Automatic at that time were the same prices as were quoted to others, other customers? Say, vending machine operators, jobbers, or chains, and what-not?

A. It was a special price a special account, comparable with the same price as quoted to the others?

[fol. 222] FRANK A. ENGLISH, was thereupon called as a witness for the commission, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give the reporter your full name and personal address, Mr. English?

A. Frank A. English, 555 Gibson Avenue, Kingston, Pennsylvania.

Q. And your position with the Planters Nut and Chocolate Company at Wilkes Barre, Pennsylvania is what?

A. Secretary and Sales Manager.

Q. State whether or not they wanted a lower price than your 24 count was selling at, at that time, 64¢, did they want a lower price?

A. Well, Mr. Forkner,

Q. Per bar I am referring to.

A. That approach, as I gather from Mr. Bencini, was

they wanted us to affect these savings and pass them along to them.

Q. Well, that would be a lower price, wouldn't it?

A. That is right.

By Mr. Forkner:

Q. What price did you finally sell to them?

A. We arrived at the price of 2¢ a bar, FOB plant.

Q. And 24 count, at 64¢ is .0267, which is a little over 2½¢ a bar, isn't it?

A. Delivered, that is right.

Q. What was the arrangement then when you said they operate?

A. Well, the information I received, again through Mr. Bencini, was that the 2½¢ a bar—the 2¢ a bar was about the price they were paying, or wanted to pay, or not exactly—that was about the cost they needed to operate with these operators with which they had franchises, or had equipment, but I didn't understand the set-up at that particular time. It was pretty early in the game.

[fol. 223] Q. I think you stated something about \$2.00 as being the price they were paying, you meant to other candy—

A. I didn't say they were paying. I said Mr. Bencini reported to me that \$2.00 a hundred, FOB factory was about their range.

Mr. Forkner: At this time, your Honor, I would like to call Mr. George U. Dunlop, vice president in charge of sales of Ludens, Inc., of Reading, Pennsylvania, adversely.

GEORGE U. DUNLOP, being called as a witness, for the Commission and, having been first duly sworn, testified as follows:

Q. Give your full name and personal address to the reporter.

A. George U. Dunlop, Greenfield, Reading, Pennsylvania.

Q. And what position do you occupy with the Ludens Company?

A. Vice President in charge of sales.

Q. And how long have you been with Ludens?

A. Since 1927.

Q. What type of candy bars do Ludens make?

A. We make several. We make Fifth Avenue, which is a milk chocolate, almonds, pulp center, woven center, I should say, containing peanut butter, and crimpy nut bar is a woven peanut butter center with caramel, golden coconut, unwrapped, and we make Unicey marshmallow bars, they are white marshmallow, chocolate coated, we make 5¢ packages of Bristol hard candies, hard candies, that is, and Bristol hard candy mats, two different packages. That is all we are making at the present time.

Q. Now, when was the first time that you had some direct contact with the distributor, I mean, with the Automatic Canteen Company of America?

A. I believe it was either the latter part of January or early February, 1939.

Q. And where was that contact had?

A. In Chicago.

Q. And who was present?

[fol. 224] A. Ralph Boyd was purchasing agent, Mr. Nate Levron, Mr. Hicks, and Mr. Letz.

Q. Was that at the office of the respondent firm of the Merchandise Mart?

A. They are their offices, I don't know their capacities. I think they are vice presidents in charge of different departments.

Q. For what purpose were you there?

A. To sell them Fifth Avenue bars.

Q. Now, in your conversation with Ralph Boyd, did you quote him a price on your candy?

A. Yes.

Q. What was your original quotation of price?

A. \$2.15.

Q. For what size count?

A. A hundred count pack.

Q. What did you finally sell them for at the end of the conference that day?

A. \$2.10.

Q. Whether or not you reduced them from \$2.15 down to \$2.12 per hundred before going down to \$2.10?

A. That is right, we went to—from \$2.15, to \$2.12, to \$2.10.

Q. State whether or not the respondent or its officials knew the price of your 24 count—

Mr. Hourey: If your Honor please, I object.

Trial Examiner Bayly: Well, whether they knew it. Did he tell them, or didn't they, or did they disclose knowledge of what your price was?

The Witness: Well, I imagine they did because they were buying 24 count here in Philadelphia.

By Mr. Forkner:

Q. Was that billed to Automatic at Chicago?

A. Yes, sir.

Trial Examiner Bayly: During this conversation what was said to get you to change your price, to put it down lower, just in substance as you remember.

The Witness: Well, I think that I personally changed the price to \$2.15 because I apparently was not going *going* to get the business at that. We were very anxious to get the business for—from the point of distribution that the Canteen Company could give us.

While I couldn't truthfully say that any pressure was put on to bring it down—

[fol. 225] Mr. Forkner: Suppose you just confine yourself to what was said. That will help us a little more.

Mr. Gravelle: Your Honor, Mr. Dunlop, as I understand it was answering your question.

Trial Examiner Bayly: Yes, he was. Go ahead.

The Witness: Well please —

Mr. Gravelle: I think he has the right to do that.

Mr. Forkner: Just give in substance what was said.

The Witness: Well, we discussed the distribution of Fifth Avenue on a national basis and the Canteen Company, while admitting the bar had a good sale in the Philadelphia area, didn't do a thing to put it in nationally without giving it a further test in a little wider market.

So, I made a price of \$2.10 FOB Reading or Chicago, and shipped a carload to them for distribution out of the Chicago operation with the understanding that if the sale was successful in that additional area, they would take it on nationally.

We, of course, figured before making the price at \$2.10, the question of freight savings, they were a house account, they were—the distribution they could give us which would be of tremendous volume to us, packed at certain savings, but the main reason for making the price, of course, was distribution which we didn't have through the jobbers.

Q. Now, let's understand how it developed. There were some men representing the respondents in on this conference. Was your original contract, and your original conversation with Ralph Boyd?

A. Yes.

Q. You talked to him about how long?

A. Not very long, maybe five minutes.

Q. Then he called in who?

A. I hadn't met the other principals when he called them in it was supposedly for me to meet them.

Q. Were they present most of the time, or all of the time?

A. Well, they were in and out. I don't believe Mr. Levron was there very long. I think Mr. Higgs was probably there most of the time, the others were in and out.

Q. How long did that conference last, about?

A. I would say about an hour.

Q. What was the main topic of conversation with regard to price?

[fol. 226] A. Well,

Q. That was involved in your two reductions from \$2.15 to \$2.12, and from \$2.12 to \$2.10 per hundred, just in substance.

A. I can't recall exactly what was said. In substance, as I recall it, I believe Mr. Boyd might have indicated to me that \$2.15 was a little steep, and I tried to get \$2.12, but he still figured that that was a little high. So, I came down to \$2.10, which would close the business, that is as near as I can recall.

H. EARL EBB, was thereupon called as a witness for the Commission and having been first duly sworn, testified as follows:

**Direct examination.**

By Mr. Forkner:

Trial Examiner Bayly: Now, if you don't mind, while counsel is getting ready, I would like to ask you a question or two.

You are a cost man?

The Witness: Yes.

Trial Examiner Bayly: Based on your knowledge and experience in the candy manufacturers business, would you say that generally speaking the candy manufacturers have cost systems worked out so that at any given time they know what their costs are, what do you say about that?

The Witness: At any given time? I believe most of them operate about the way we did operate.

Trial Examiner Bayly: How is that?

The Witness: On a standard cost basis.

Trial Examiner Bayly: Well, now you have different types of costs, you have what I would call the run of the mine costs, that's the production, your material, your labor, and your overhead.

The Witness: That is right.

Trial Examiner Bayly: Would the average manufacturer have that fairly well in hand, would he know that pretty well?

The Witness: The average manufacturer I would say, no, from meetings before the Board we have attended.

[fol. 227] Trial Examiner Bayly: All right, now, let me ask you another phase of that. How about the distribution costs, would he know as much or less about that, that is; I am just asking, based from your experience, you are a cost man and your experience in the field—

The Witness: Oh, I think his knowledge of distribution costs would be on a par with the general costs.

Trial Examiner Bayly: It would be about a 50-50 split?

The Witness: Yes.

Q. Now the next statement is—"free deals", can you enlarge upon that a little bit?

A. This report, in making this report up, it is the greatest piece of chicken feed I have ever had to work on, because this was a new bar for us, we were trying to develop different packs and doing everything we could to get the sale of it going.

Q. You mean by that, you gave free goods?

A. In doing that we gave free deals of all kinds to jobbers and syndicates.

Q. Both to those in 24 count and 60 count?

A. Yes, they also had specialties.

Q. You had them of all kinds and descriptions.

A. Right.

Q. Did you have a type of free deal where you would give one box away with a delivery of so many boxes?

A. One box with 16, two with 32, three with 48, all kinds of ways.

Q. Did you also have free deals where you sold, so the jobbers could sell two for 6¢?

A. The retailer?

Q. The retailer, I mean.

A. We had 1¢ sales. With each box of bars we give another box in which each bar was 1¢.

Q. Shown under column 11, you have "1¢ sales—two for 6¢".

A. That is right.

Q. The next statement in column 11: "10¢ box placement." What do you mean by that?

A. In order to try to have the jobbers take it and get us distribution, we offered him 10¢ a box rebate of the 5th Avenue bars in order to buy. That is, if our price was 64¢ delivered, we gave him 10¢ a box off of that.

Mr. Forkner: Where is that shown?

The Witness: "10¢ box placement."

[fol. 228] By Mr. Hourey:

Q. Now did you give any of these free deals, or allowances to the Automatic Canteen Company of America?

A. No, they did not enter into that at all.

Q. In all of those various deals and premiums, mean—did they mean a lower net return to you from your jobber business and the price indicated in the column.

A. Yes, definitely.

Q. So that the price which is in column 8—

A. It is in the wrong column on this one.

Q. This price in Column 8, was—does not reflect these deals you have just talked about in the 64¢, and 68¢, and \$1.50, does it?

A. That does not reflect. This is not all the free deals we have.

Q. Can you think of any other free deals? Did you give premiums away, such as shirts, or neckties or goggles, or things like that?

A. Lots of premiums—shirts.

Q. In other words, because it was a very wide-spread practice?

A. Car heaters.

Mr. Gravelle: What was that?

The Witness: Car heaters. Yes, it was a common thing in those days, shirts—we detailed crews—

By Mr. Hourey:

Q. What do you mean by that?

A. Retail salesmen, really.

Q. What did they do, the detailed crews?

A. Mr. Dunlop can explain this better. We would hire a crew of salesmen, to go in to a certain territory and buy these Fifth Avenue bars from the jobber and resell them to the retailers in order to get the retail distribution.

Q. That would be particularly true when you were introducing a new bar?

A. Oh, yes.

Q. That is not reflected in the price as indicated in column 8?

A. No; that is very expensive.

Mr. Hourey: That is all.

Mr. Forkner: One more question or two.

[fol. 229] Q. Mr. Erb, did you or your company, when you had a deal, permit that class of trade which happened to be maybe a jobber, or syndicate, or vending machine operator, to whom these deals were offered, to take the equivalent discount equal to the value of a deal instead of having the deals?

A. Oh, no.

Q. You didn't?

A. No.

Q. You didn't offer these fellows a choice of either taking a shirt or heater—

A. They had to buy the Fifth Avenue bars, and get them out.

Q. They had to take it within the time limit set up by your particular offer according to the terms of your offer to them?

A. The time, yes.

Q. That every deal had a time limit, didn't it?

A. A certain time.

Q. They were offered to certain classes of your trade?

A. Jobbers.

Q. But you did offer, did you not, to the Automatic Canteen Company the privilege of having discounts equivalent to, or the value of those deals, is that it?

A. Discounts?

Q. Or a lower price?

A. Oh, I never—I would never have figured that out. I don't know if it would reflect the free deals—I don't know.

Q. That was never figured out; was it?

A. There was never a price as low as we gave the jobbers when we had detailed men out, that cost too much.

Q. You are figuring the cost of your salesmen, the detail men?

A. Yes.

Q. Do you understand what I mean? You didn't offer say, if you were offering shirts as a premium, or meters, you didn't allow the person to whom you offered those to have a discount on the price of candy which would equal the value of that particular premium, or heater, instead of taking the article itself?

A. No.

[fol. 230] GEORGE U. DUNLOP, having been previously sworn was recalled, and testified as follows:

Redirect examination.

By Mr. Forkner:

Recross-examination.

By Mr. Hourey:

Q. Did you determine your price and quote it to them, or did Automatic try to fix your price?

A. We determined the price and quoted it to them, and I cannot—there was not one instance where they did not agree to our increases as materials went up. They apparently appreciated that, and we have never had any trouble regarding the price with them.

JACK J. DREYFUS was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give your full name and address to the reporter?

A. Jack J. Dreyfus, 161 Central Park South, New York.

Q. And with whom have you been associated for the last number of years?

A. DeWitt P. Henry Company.

Q. For how long?

A. DeWitt P. Henry Company was organized in 1918; since the organization, 1918.

Q. And in what capacity have you been acting?

A. Sales Manager.

Q. And in what territories have you worked?

A. Well, I have practically the entire country. My sales managing job is a little bit different from the job that is usually assumed. Mr. Henry and I were associated together for forty years. He handled the inside and I handled the sales end. Actually, I don't control the job of salesmen.

[fol. 231] Q. And to what type of customer have you sold the products of DeWitt P. Henry Company?

A. Well, formerly we were entirely a jobbing house; at one time we used to sell entirely to jobbers, and I think about that, well, '33, we changed our entire business, and I moved to New York. I'm a Southerner; my home is originally Montgomery, Alabama, and I moved up with the idea of changing our entire sales policy and going after chain store business, concessionaires and special accounts, making special brands, private lines.

Q. As such, did you have contact with the Automatic Canteen Company of America?

A. I called on Mr. Anderson in Chicago, at his office.

Q. Now just give us, according to your recollection, Mr. Dreyfus, the substance of your conversation in respect to selling him that bar at that time?

Mr. Hourey: If your Honor please, we object to the question on the ground that it calls for conversations with a man long since deceased. We think that under the rules of evidence, conversations, as well as communications, with deceased beings are not admissible.

Trial Examiner Bayly: Maybe you could meet Mr. Hourey's objections by asking this witness, just skirting that, following negotiations did you arrive at a price, what was his first price desired, what price was subsequently agreed on as a result of conversations; and skirt what was said and done. Then if this chart shows those sales, well, that would probably meet Mr. Hourey's objection.

Mr. Forkner: Your Honor does not want any answer to the objection made by Mr. Hourey at this time?

Trial Examiner Bayly: That is correct.

Mr. Forkner: In the record?

Trial Examiner Bayly: That's right. I have indicated how you could meet that objection that Mr. Hourey made, and I suggest you proceed along that line.

Mr. Forkner: I don't believe I can do it, but I'll try it, your Honor.

By Trial Examiner Bayly:

Q. Mr. Dreyfus, following your conversations with some representative in Chicago when you were seeking a connection to sell your product, did you subsequently agree on a price?

[fol. 232] A: Yes, we did.

Q. And was the price subsequently agreed on different from the one you initially wanted to get from them?

A. No, sir.

Q. It was the same price?

A. Yes.

Q. All right, go ahead.

A. Do you want the price? The price was \$1.85 for 100-count.

Trial Examiner Bayly: Go ahead, Mr. Forkner.

Mr. Forkner: That's what I meant, it would be impossible to bring it out without bringing that out, and it is a declaration and statement within the scope of the agency of the employment of Mr. Anderson; other letters, your Honor,

have been introduced, and the only possible way, since Mr. Leveron has testified he acted with full authority of the company and within the scope of his authority, I think all should be admissible, on the grounds of admissions, and also on other grounds.

Q. Can you tell me whether or not the price of \$1.85 per 100 was quoted first or mentioned first or alluded to you by you or by the Automatic Canteen Company?

A. Well, as I recall it, I think that Mr. Andersen told me that his top price was \$1.85.

Mr. Hourey: Your Honor, I object to that.

Trial Examiner Bayly: Objection sustained. The question is "Did you originally seek a better price than that which you got to sell for?"

The Witness: To the best of my recollection, I did not.

Mr. Forkner: At this time, Your Honor, Ernest H. Fox, President of the Austin Packing Company of Baltimore, Maryland, adversely.

[fol. 233] ERNEST H. FOX was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give your full name and personal address?

A. Ernest Herbert Fox, 4021 Cranston Avenue, Baltimore 30, Maryland.

Q. What type of business are you in?

A. I am engaged in the manufacture of peanut butter sandwiches.

Q. How long have you been in that business?

A. Ten years.

Q. Would you state your first contact with them and under what circumstances?

A. The first contact was made by a Baltimore manager of the Canteen Company by name of Phillip Maginnis who approached me and asked me the price of my 100 count peanut butter sandwich and I told him the then prevailing price, \$2.35 per 100 count.

Q. Now, as a result of that contact, did you later talk with any officials of the Automatic Canteen Company of America?

A. The next contact was made by a Mr. Ralph Boid and a Mr. Hakes, who visited my office.

Q. At Baltimore?

A. At Baltimore.

Q. In what capacity was Mr. Boid talking to you?

A. I really don't know. I imagine he was a buyer because he came in to discuss price and the possibility of our supplying them with the merchandise?

Q. Now, Mr. Fox; if you will give me in substance as best you can remember, the conversation which you had with Mr. Boid and Mr. Hakes?

A. Mr. Hakes did not enter into the conversation at any time. However, the conversation between Boid and myself ensues as follows.

He said to me they were buying merchandise of similar nature for less money and that if I wanted the business I would have to be competitive. I went into the usual trade practice of telling them how good our product was, it was [fol. 234] superior quality and we could not sell at less than verbally quoted price to Maginnis.

He then proceeded to tell me of the large volume sales that could be attained through their company, that they were operating nationally and that they would give us a substantial volume business which was worth some consideration for lower price than what we were quoting. I did not commit myself and told him I would take the matter up with my brother who is the Vice President of the company and that was the end of the conversation.

Q. Now, state whether or not in your conversation with Boid you quoted him in this conversation a 100 count at \$2.35?

A. I affirmed the price of \$2.35 to him at that moment as our price at the time, that was \$2.35 f.o.b. Baltimore.

Q. What did he say in reference to that particular quotation?

A. He said it was too much to pay for that type of product inasmuch as they were securing a similar product of similar nature. He even mentioned the price of \$2.25, that they felt they could not pay more for that type of product.

Q. When he mentioned the price of \$2.25, did he mention the name of the company giving that price?

A. No specific company that was giving them that price, but they were buying peanut butter sandwiches of the same type and quality at \$2.25 per 100.

Q. Did he indicate to you the number of outlets, the number of vending machines?

A. He did not specifically state the number of vending machines and he just merely mentioned the national operation and the large volume.

Q. As a result of that conversation did you take it up with your brother?

A. I did.

Q. Did you later quote them a price of \$2.25?

A. I quoted Mr. Maginnis a price of \$2.25.

Q. Did you then sell to the American Canteen at \$2.25 per 100 f.o.b. Baltimore?

A. Yes, we did.

[fol. 235] Q. What did you find to be your \$2.25 price in respect to your cost?

A. We felt that it was about 4% below what we would like to make as a gross profit.

Q. Now, your sales to all other customers at the time that they received the price of \$2.25, was \$2.35 per 100.

Mr. Howrey: I object unless the type of customer is identified.

Trial Examiner Bayly: This is the starting point. The objection is overruled. Proceed.

By Mr. Forkner:

Q. You have already stated what type of customer you sent this 100 count Austin peanut sandwich to?

A. That is right.

Q. You told us what?

A. Only to operators of vending machine.

Q. Are you selling to the Automatic Canteen Company at the present time?

A. Yes, we are.

Q. Are you now selling your Austin peanut sandwich at the same price to all vending machine operators?

A. Yes, we are. Well, I will just say we are.

Q. If there are any exceptions, give me what they are.

A. I think there are just one or two exceptions. Where is—there is a combination buyer, for instance a jobber may want to purchase these 100 count sandwiches to resell to a vending machine operator, in which case one end of our business, jobbing basis, is based on 24 count prepaid rather than confuse part of the business on f.o.b. and prepaid.

We have a little different price which goes prepaid with the rest of the shipment.

Q. How much is that?

A. \$2.85 per 100 prepaid.

Q. What is the price to vending machine operators?

A. \$2.60 f.o.b. Baltimore.

Q. Now, did you have a letter from the Automatic Canteen Company in reference to credit terms?

A. As I recall, we had one letter. After we had made the original shipment and sent the invoice to Chicago, a letter was received with reference to our credit terms.

Our terms and our industry because of the nature of the business is 1%—ten days because in the bakery good [fol. 236] flour, shortening and other products that go into bakery products are on an industry wide 1% basis.

The general practice of confectionery, candy, 2% basis; and the letter asked if we had been in error in quoting 1% instead of 2% as they were accustomed to get that from suppliers of candy.

We wrote and said, no, that was our terms in the baking industry.

Q. Did that end the matter there?

A. It ended the matter of discount terms.

Q. After you sold them at \$2.25 and then you raised your price to \$2.35, did you continue selling as you had before to the Automatic Canteen Company or was there a gap in there, a period of time which you didn't sell to the Automatic Canteen of America?

A. Well, there was no particular gap when we didn't sell them.

Q. As I understand, after you first sold them at \$2.25 then you raised the price to \$2.35, did they continue to order immediately from you at the increased price?

A. Yes, the same orders in effect continued to stay except at the advanced price.

Mr. Forkner: I am calling at this time Your Honor Mr. J. M. Gleason formerly with the W. F. Schrafft and Sons Corporation located at Boston, Massachusetts, adversely and now with the Charms Company.

JOHN M. GLEASON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give the Reporter your full name and your own personal address?

A. John M. Gleason, 16 Cooleys Road, Marblehead, Massachusetts.

Q. And where are you residing at the present time?

A. Berkeley-Carteret, Asbury Park, New Jersey.

Q. When did you start working for the Schrafft Company at Boston, Massachusetts?

A. In 1920.

[fol. 237] Q. And in what capacity did you act with this company subsequent to June of 1936?

A. Sales Manager.

Q. And who were your assistants?

A. Ralph MacKendrick and Harold H. Sprague.

Q. And to whom in this company did you report on your activities as Sales Manager?

A. To the President, William V. Walburg, and George F. Walburg, Treasurer.

Q. Now, Mr. Gleason, will you give the substance of that conversation as you best remember it, or to your best memory and recollection.

Trial Examiner Bayly: Now we are only concerned substantially with what was said there by you and representatives of the respondent having to do with price terms, conditions of shipment, freight, sales, etc.

By Mr. Forkner:

Q. You may use any notes that will help you.

A. Mr. Swanson and Mr. Andruss endeavored to impress me with the advantages of doing business with the Automatic Canteen Company of America. Do you want me to mention those?

Q. Yes, go through and tell me all you recollect.

A. They pointed out the fact that their machines were selling candy 24 hours a day in prominent locations, that Schrafft would benefit by the advertising value of distribution in thousands of outlets, that the company would benefit by substantial purchases of the various items which they would decide to purchase, that there would be a saving in cost of cardboard cartons containing 24 bars as the Canteen Company would furnish free of cost shipping containers to hold 100 count five cent bars.

They explained that all buying would be on an f.o.b. factory basis eliminating the freight charges, that all salesmen's expenses including salaries, traveling expenses, sampling, etc., would be eliminated, that there would be no merchandise returned for credit, that there would be no loss from bad debts and that free deals would be eliminated.

Q. Did you make any reply to the argument that free deals would be eliminated?

A. I explained to these gentlemen that Schrafft's did

not offer any free deals. Therefore, there would be no saving from that, in that respect.

[fol. 238] Q. Did you explain your price to them at that time on 24 count?

A. Yes, I mentioned that Schrafft's price was sixty cents per box of 24 bars whereas most other manufacturers were obtaining sixty four cents. This difference is due to the fact that other manufacturers were offering free deals whereas Schrafft was not.

Q. Had you been making or selling candy in 100 count cartons before the date of that conversation?

A. No.

Q. In what size count had you been selling your candy?

A. 24 count.

Q. Now, when you talked to them did you tell them that you had been selling 24 count or making 24 count candy, and the price?

A. Yes.

Q. And what price did you quote to them on 24 count?

A. Sixty cents per box.

Q. Can you state what Mr. Andruss may have said as to the reason or reasons all of these factors were gone into and mentioned in these conversations? I mean Swanson not Andruss:

A. To furnish a sufficient reason for quoting the Canteen Company a lower price than that in which Schrafft Products were being sold.

Q. Had you given in substance all the conversations relating to the following named factors? First, f.o.b. factory—

Mr. Hourey: If Your Honor please, I object to this question. The witness has given the substance of the conversation. I don't think he should summarize it.

Trial Examiner Bayly: Did you discuss anything about freight, changing the policy of your freight?

The Witness: I probably mentioned that our regular terms of sale were f.o.b. factory with freight allowed up to \$1.50 per hundred weight.

By Mr. Forkner:

Q. And what did they say to that on freight?

A. That the Automatic Canteen Company would absorb the freight.

Q. Second, in regard to any conversations in regard to the elimination of salesmen's selling cost?

A. As I recollect it Mr. Andruss mentioned a percentage [fol. 239] figure as having been reported to the Canteen by their suppliers representing selling costs.

Q. Salesmen's commissions?

A. Yes.

Q. Do you recall about what that percentage was?

A. My impression was 7%.

Trial Examiner Bayly: Let me ask Mr. Gleason something here. Was the Schrafft policy at that time to pay a salesman's commission on such sales?

The Witness: No, salesmen were working on a salary arrangement, not on commission.

By Mr. Forkner:

Q. Third, have you mentioned in substance at all the conversation had in regard to the substitution of the 100 count size and furnishing of the 100 count size in place of your regular 24 count carton size?

A. My recollection of that is the cost of 24 count cartons which Schrafft was using at that time was slightly less than the figure quoted by Mr. Andruss.

Q. That was by Mr. Andruss?

A. Yes.

Q. In Mr. Swanson's presence?

A. Yes.

Trial Examiner Bayly: Was he quoting on the 100 count carton or 24 count carton?

The Witness: The 24 count carton.

By Mr. Forkner:

Q. Have you mentioned in substance

A. I think I better correct that. It might have been, it probably was Mr. Swanson. It must have been Swanson.

Q. Who did most of the talking?

A. Swanson.

Q. Now, fifth, have you stated in substance all that might have been said in relation to elimination of returns for stale and unsaleable candy? Stating who made the statement, if you can.

A. I mentioned to them that Schrafft's loss from returned goods and also the loss from bad debts were both less than the figures which Mr. Swanson quoted as being representative of other manufacturers' cost.

Q. I take it Mr. Swanson gave you percentages?

A. As I recollect, he did.

[fol. 240] Q. What were those percentages based upon? Gross price?

A. Selling price.

Q. Have you stated all the conversations in substance in regard to free deals and discount deals?

A. I don't recollect any further conversations.

Q. Or state whether or not there was any percentage suggested by Mr. Swanson which you could reduce your price to by reason of the fact that you didn't need to give them any free goods or discount deals?

A. There was, but I told him that saving would not apply in Schrafft case.

Q. Now, have you stated in substance all that Mr. Swanson stated in regard to the advantages of distribution or volume?

A. As near as I can recollect there was nothing in addition to what I have already mentioned, that substantial purchasers should reduce manufacturing costs and there was considerable advantage in having merchandise on sale in prominent locations twenty four hours a day.

Q. Were there any comparisons made by Mr. Swanson in that conversation as to price or prices at which they were buying comparable items of candy to that which Schrafft sold?

A. Yes. As I remember Mr. Swanson mentioned that because of the savings he had referred to their various sources of supply were furnishing them with five cent bars, if I remember correctly \$2.63 per hundred.

Q. On all types of candy?

A. On all types of five cent candy.

Q. You mentioned that they were reselling that candy to distributors at the same price?

A. Yes, he did say however that they had in mind buying certain types of five cent candies at somewhat higher prices and that if arrangements were made to buy the Schrafft line of bars, these bars would be in the higher priced category.

Q. Did he mention anything about the Hershey Candy Company?

A. Yes.

Q. What was said about that?

A. Mr. Swanson explained, as I remember it, in the beginning the Canteen Company had made arrangements with the Hershey Chocolate Corporation for their standard five cent bars as they felt that it would have a tendency to [fol. 241] raise the level of quality of merchandise which up to that time had been selling in vending machines.

Q. You state they were then buying Hershey bars at that time when they talked to you?

A. Yes.

Q. How did that conversation end?

A. In substance I told them that I would be glad to report the conversation to the Cost Department and request that they give me figures which I would be permitted to quote to the Automatic Canteen Company?

Q. Now, did you do that?

A. I did.

Q. State whether Commission's Exhibit 106A represents the answer in the conclusion of your cost figures on the data submitted to them by you in your conversation with Swanson and Andruss?

A. It does.

Q. There is one more question on this conversation I would like to ask you. What was the reduction in price Swanson desired by reason of elimination of the 24 count package, if you can recall that and the substitution of the 100 count?

A. As I recollect it, Mr. Swanson stated that the highest price they would be able to pay would be \$2.22 per 100.

Q. You have not quoted any price to them at that point at all except your regular 24 count?

A. No, that is right.

Q. Now, I show you Commission's Exhibit 106C and D, the first of which is a letter dated February 13, 1937 addressed to Mr. Swanson; the second of which is a list of samples and ask you whether or not these seventeen samples that were sent to the Automatic Canteen Company were priced at \$2.37½ per 100 in accordance with your letter of February 6, 1937 which is Commission's Exhibit 106A?

A. Yes.

Q. In connection with Commission's Exhibit 106B which I now show to you which is a letter dated February 11, 1937 I notice that in the second paragraph there is a mention by Mr. Swanson "My associates" and later on in the same paragraph "My partners."

Now, in these conversations with Mr. Swanson, did he [fol. 242] explain or tell you, or mention the names of any of the so-called associates or partners, and if so give me the name of the one or two that might have been mentioned.

A. The only name I recollect is that of Mr. Frank Anderson, Treasurer of the company.

Q. Now I show you what has been marked as Commission's Exhibit 106E, F and G, which is a letter dated February 15th, 1937 from Mr. Anderson addressed to you, and ask you if you understood the fifth paragraph in relation to the "3%"?

A. I believe the 3% was a typographical error and it should have been 3 cents.

Q. Why do you think that?

A. As 5% of the sixty cent per carton selling price would be three cents.

Q. Of 24 count?

A. Yes.

Q. And what would 5% of the sixty four cent price be?

A. Three and two tenths.

Q. Was that your understanding of that paragraph when you read that letter at that time?

A. It was.

Q. I might simplify this phase of it by asking you this, in substance did Swanson in this earlier conversation bring out most of the points made in this letter of February 15, 1937 which is Commission's Exhibit 106E, F and G?

A. Yes he did.

By Mr. Forkner:

Q. Will you state whether or not the statements made in this letter, namely the letter of February 20, 1937, are true to the best of your knowledge and belief?

A. Yes.

Q. I direct your attention to certain parts of that letter and ask you whether it was true as stated in paragraph 2 that your costs "will not permit our meeting the lower prices quoted by other manufacturers as indicated by your letter"?

A. That is correct. And my reference there was to the price of \$2.03 quoted by other manufacturers.

Q. Were quoted by whom to you?

[fol. 243] A. By other manufacturers to the Automatic Canteen Company.

Q. How did you get the information?

A. From Mr. Swanson.

Q. Is that based on your own personal knowledge or was that based partly on the figures given you by Mr. Waldburg?

A. Based on the costs figures.

Q. Now, what about your own personal knowledge about the truth of the statement made in the 3rd paragraph of this letter of February 20, 1937 where it starts "saving would result in doing business"?

A. That information is also obtained from the Cost Department.

Q. Well, is part of that of your own knowledge and if so what are the parts you would know about?

A. The offering of free deals.

Q. Was what?

A. Was the only part of which I would have any definite knowledge. Sampling expenses, freight costs and similar costs were compiled by the Cost Department.

Miss Reporter, will you read the question?

(The reporter read the question as follows:

"Q. State whether or not it was stated in this conversation to you that the Automatic Canteen Company could not pay and would not pay \$2.37½ per 100 for Schrafft bars?"")

The Witness: It is impossible for me to recollect whether or not that statement was definitely made but in the light of subsequent correspondence I assume that it was.

Trial Examiner Bayly: Go ahead Mr. Forkner.

By Mr. Forkner:

Q. Will you look at Commission's Exhibit 106 J which is the letter dated March 20, 1937 in which you quote a price of \$2.22 per 100, in which the following statement appears, "The figure you name does limit what it would be possible to pay."

Now, the question is this. Were all of the items which you name in this letter which is Commission's Exhibit 106J, quoted in an earlier letter which is Commission's Exhibit 106D at another price, namely of \$2.37½ per 100 bars?

[fol. 244] A. The last three items?

Q. Will you name those three items?

A. Opera, peppermint and four sour orange packets.

Q. State whether or not all of the items named on Commission's Exhibit 106J were then sold the jobbing trade at sixty cents per 24 count?

A. They were.

Q. Now I wish you would look at Commission's Exhibit 106Z 2, this letter on the back of that exhibit, I would like to know if that is written in your handwriting?

A. Yes.

Q. Are the statements therein contained true?

A. They are.

Q. Will you tell us in your own words what the discussion was and what was the result in regard to returned goods which is involved in this exhibit?

A. One of the advantages mentioned by the Canteen Company of America, by which Schrafft would benefit as compared with doing business with jobbers was that no goods would be returned for credit.

Q. Was that one of the items for which a lower price was to be permitted?

A. Yes.

Q. What happened in this case?

A. In this case the Cambridge branch of the Automatic Canteen Company requested Schrafft's to allow credit for a certain quality of candy which had become damaged from heat.

Q. Is that contained on Commission's Exhibit 106V and 106W, which is a letter with enclosures dated December 30, 1937?

A. Yes.

Q. Now, is Commission's Exhibit 106Z 2 a letter to you at Chicago in reference to your understanding with the Automatic Canteen Company on this?

A. Yes.

Q. And your reply is written on the back of that letter?

A. It is.

Q. Now, is Commission's Exhibit 106Z 5, the answer made on allowing returned goods to be credited, written by your assistant, Mr. MacKendrick?

A. Yes.

[fol. 245] Q. And is Commission's Exhibit 106Z and 106Z 1, a letter dated October 4, 1937 in the second paragraph relative to this same understanding, written however by Mr. Boid and addressed to your company?

A. No.

Q. What does that relate to?

A. It relates to the shipping containers.

Q. And what was the understanding with regard to shipping containers?

A. The Automatic Canteen Company was to furnish them to Schrafft's free of charge.

Q. About the shipping containers you had on hand, if they ceased to deal in your product what was the understanding on that?

A. The understanding was that if the Automatic Canteen

Company decided to discontinue handling any Schrafft's products they would reimburse the company for containers.

Cross-examination.

By Mr. Howrey:

Q. Directing your attention to Commission's Exhibit 106H and I, dated March 15th, 1937, isn't it a fact that Mr. F. H. Anderson did most of the talking insofar as representative of the Automatic Canteen Company he spoke at that conference?

A. Yes.

Q. You knew Mr. Andruss to be merely branch manager and Mr. Anderson to be from the home office, is that correct?

A. Correct.

Q. Directing your attention to Commission's Exhibit 106J and K, which is a letter dated March 20, 1937 written by you, was it your understanding that your Cost Department had recomputed the savings involved in doing business with the Canteen on those items mentioned in that letter and reflected that savings in the price of \$2.22 per 100?

A. My recollection is that the Cost Department figured twice and that it was on the basis of the second computation that this price was quoted.

Q. Mr. Waldburg testified that the first computation was made on the entire line and the second computation of \$2.22 [fol. 246] cents was made on particular items mentioned in the letter of March 27, 1937, is that in accordance with your recollection?

A. I would say so. I am not positive.

Q. Mr. Gleason, you testified that you were in charge of candy at OPA. It is a fact that the respondent in this case sought to get their price ceilings raised from time to time so they could pay higher prices?

Mr. Forkner: I object Your Honor, there is nothing on direct examination of the cross-examination question. And I don't further see any relevancy to this proceeding. I don't see any connection with any of the issues.

Mr. Howrey: Your Honor, I think it is relevant and germane to direct examination. The purpose of this pro-

ceeding and/or rather the charge in the complaint and evidence which counsel sought to introduce is an attempt to show that the respondent has tried to get lower prices and tried to reduce lower prices and to use means of that sort.

**Now, I am trying to show that during the war-time when this gentleman was in charge of prices of candy, that we sought to pay increased prices and sought higher ceilings so that we could do that.**

Trial Examiner Bayly: If the restrictions had anything to do with the price structure, would this question be competent, Mr. Forkner? I don't know what the answer is going to be, but if it inhibited the price at which this respondent could pay,—Now, of course, there were other people buying that would modify that. But taking this one element alone, would that be competent standing alone?

Mr. Forkner: Well, OPA merely had a ceiling. They didn't specify how low you need go but they specified how high you could go.

Trial Examiner Bayly: I will overrule that. Let us see what Mr. Gleason has to say, if he knows about that.

The Witness: They made application for increase in their ceiling price on two occasions.

By Mr. Howrey:

Q. By that you mean your selling price?

A. Yes.

[fol. 247] CHARLES P. LANG was therupon called as a witness for this Commission and, having been first duly sworn, testified as follows:

Direct examination:

By Mr. Forkner:

Q. Will you give your name and address.

A. Charles P. Lang.

Q. What is your personal address?

A. Personal address?

Q. Yes.

A. 1733 Fleming Road, Louisville, Kentucky.

Q. And with what company are you?

A. Bradas and Gheens.

Q. And how long have you been with them?

A. Approximately thirteen years.

Q. And in what capacity?

A. Sales Manager.

Q. Now when you talked to Mr. Boid, what did he tell you, just give the substance of the conversation. No, just a moment—withdraw that. When you first talked with Mr. Boid, did you tell him that you had a one hundred count size?

A. Well, I guess he presumed that. A twenty-four count size didn't go into his picture.

Q. He told you that?

A. Yes, sir, it was necessary to pack the one hundred count for a number of reasons.

Q. And what were some of those reasons?

A. Well, in handling all sales that I have handled, they have always been without any sales cost to the company other than all usual accounts, in other words, we handle them without any sales cost. There was no salesmen to make regular calls on Automatic Canteen or any of their distributors.

Q. Did he mention that to you?

A. Yes.

Q. All right, some of the figures that he mentioned to you were considered in making the prices to Automatic?

[fol. 248] A. Well, sir, the trade practice in the industries was shipping to customers on a delivered basis.

Q. What did Mr. Boid want?

A. We paid the freight and charged it on the invoice.

Q. He wanted it on a FOB basis?

A. Yes.

Q. And wanted you to take that into consideration in making your price to him?

A. No.

Q: Now was there anything said about credit risks affecting prices that you could give to them on bars?

A. There might have been. We knew that they were a triple A-1 firm when we solicited their business.

Q. Now was there anything said by Mr. Boid about a discount equal to free deals and free goods which you might be giving to jobbers or to other customers?

A. That might have been discussed, yes.

Q. Why were all these factors discussed in this conversation with Mr. Boid as he so stated to you—what was the reason for them?

A. Well I presume to reduce the price on the basis of twenty-four count and putting in another package eliminating the costs, at the same time reducing price.

Q. In other words, he wanted lower prices?

A. By eliminating costs.

Q. Well now, did you finally quote him prices which is on Commission's Exhibit 236-F and Commission's Exhibit 235 as a result of the conversation; \$2.12 per hundred?

A. Yes, sir, that is right.

• • • • •  
Q. Now in Commission's Exhibit 236-O, which is a letter dated February 25, 1942, I notice that you in a letter there to Mr. Boid spoke about bringing your bars "into your price range" meaning Canteen's price range. And there in the last paragraph "and give you the kind of merchandise that will fit your set up." Now what were you referring to there when you made the statements in the letter dated February 25, 1942. State whether or not first—whether that is referring to the conversation that you had with Mr. Boid with regard to shipping price?

A. It was, we discussed the change in price about that time. Materials were advancing. Two bars were not being made at that particular time, two summer bars, namely the Pyramid Bar and the Cold Wave bar, and when we changed our prices on the January set up to \$2.30 I believe there on all four items, two of those items were not in the process of manufacture, and didn't go into process of manufacture until about March or April as to whether it got warmer.

Q. Now is it true that you had quoted a price in your January 26 which is Commission's Exhibit 236-K of \$2.30 on each item per hundred?

A. That's right, but we didn't sell any of those at \$2.30, those two items.

Q. Which two, name them?

A. Five cents Cold Wave and five cents Honey Brazil Nut Fudge.

Q. Now as the result of the conversation that you had with Mr. Boid which is referred to in this letter, did you then change the price of these two items, Cold Wave and Honey Brazil Nut Fudge to \$2.20?

A. That is right.

Q. Which you put in your price list effective as of March 9, 1942, and which is Exhibit 236-N?

A. That is right.

Q. What was the statement made by Mr. Boid at that time that influenced you to give them a lower price than you had formally given them of \$2.30?

A. Well, I guess it was a refiguring of costs on it.

Q. What did he say; I am referring to statements?

A. He might have questioned those two prices in those two items and we went back and refiugured the cost on them.

• • • • •  
Q. Now in going back to the original question, I ask you what was there in the conversation in which Mr. Boid stated to you which caused you to state in here that you were trying to bring your price within range?

Trial Examiner Bayly: Just in substance Mr. Lang.

Mr. Forkner: Just in substance.

The Witness: Well I took from this that he probably had a basis on which he tried to bring the cost of these bars within a price range, and we tried to bring it there as closely as we could. Whether we did exactly what he wanted us to, I don't know, but this list was accepted by him eventually.

[for 250] Q. Well, you hadn't made a hundred count for anyone else before?

A. No.

Q. And you didn't sell hundred count or offset it to anybody else when you made it for them?

A. No, we couldn't.

JOHN F. POETKER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Would you give your name and address to the reporter, Mr. Poetker.

A. My business address is 1629 Vine Street; personal, 3035 Queen City.

Mr. Forkner: A little bit louder, Mr. Poetker, so these men over there can hear you.

Q. How long have you been in the jobbing business?

A. 35 years.

Q. What did they tell you when you went to talk to them about a hundred count?

A. They told us our customers had to have beautiful lithographed boxes to carry these twenty-four bars, and that the vending machine didn't need that because they threw them right in the machine and there was a saving in cost of manufacturing when they made one hundred count, that they didn't have when they made ours, and they didn't have a man calling on the canteens—whole string of stuff they told us.

Q. Well, then, they didn't give you a choice as to whether or not your customers were going to have a lithographed box or a plain box?

A. No, definitely not.

Q. Nor a choice between a twenty-four count or a one hundred count box?

A. No, we had no choice.

Q. You mean to say that they didn't give you the choice?

A. That's right.

[fol. 251] Mr. Howrey: I object to that question. Manufacturers are not on trial here. This is a case against the Automatic Canteen Company. What relationship there was between the manufacturers and this witness is not an issue here.

Trial Examiner Bayly: They are joined, are they not, Mr. Howry, by virtue of the fact that this witness and his company was able to buy from manufacturers, sellers, the same as the Respondent, Automatic Canteen Company. In that respect there was a kind of common denominator, wasn't there, touching the two, that would make them a part of this proceeding?

Proceed. Objection overruled.

By Mr. Forkner:

Q. Now would you have wanted to have bought the one hundred count candy from all these companies if you could have gotten it at the price at which you see here that Automatic bought them at?

A. Yes, sir, we wouldn't have missed a one.

Q. What would you have done about your lithographed boxes?

A. Well, I don't think the consumer is too much interested in lithographed boxes. I think the thing he is interested in is the candy. Most of the candy is taken out of the lithographed boxes anyway and put on the display stand, whether it is taken out of a carton without any lithographs or whether a beautiful box. The effect is the same when the consumer lays down his money for it.

Trial Examiner Bayly: Of course the cost is a little less with a plain box?

The Witness: I assume that's right.

By Mr. Forkner:

Q. Now state whether or not any supplier with whom you did business offered to accord to you any of the following savings in making a price to you: One, a saving result-

ing in freight by buying f. o. b. factory. Did any supplier ever offer to give you a lower price by reason of your buying f. o. b. factory?

A. No, sir.

Q. Two—savings resulting from elimination of sellers' salesmen's expense?

A. No, sir.

Q. Three—savings resulting from elimination of twenty-[fol. 252] four-count cartons and substitution of one hundred count cartons?

A. No, sir.

Q. I suppose with the exception of the two you mentioned here that you got one hundred count from?

A. Yes, and that was against their will.

Q. They didn't offer it to you?

A. No.

Q. Savings resulting from elimination of returns of unsaleable candy?

A. No.

Q. Five—savings resulting from elimination of free or discount deals?

A. No.

Q. Six—special advantages of advertising for distribution given?

A. No.

Q. Did any of these companies from whom you purchased offer to do that?

A. No, sir, not a one.

Q. Now in addition to the companies you have named, did you buy from a larger number of companies that the record shows Automatic Canteen bought from?

A. Yes, I went through this exhibit and I found that we bought from forty-nine companies.

Q. Forty-nine companies, and how many companies did you analyze?

A. Nineteen.

Q. Nineteen. Now any remarks or statements you have made here in regard to what these companies offered you, represent the other forty-nine companies that you bought of, that Canteen also bought of, during the period of 1936 down to the present time?

A. That holds good of any manufacturer we bought from.

Q. Were you offered by Wrigley Company the opportunity of buying the hundred single stick packages at any price?

A. No, sir, we never knew that it existed until we saw them in vending machines, and then they wouldn't sell them to us.

Q. Now if you had had an opportunity to have bought the one hundred single stick gum at 38¢, on the same discount terms as you bought on the wrapped gum, would you have got that?

[fol. 233] A. We certainly would. That would be a wonderful thing to us, to put an item like that into our stores and make it available to the consumer. It would have given the retailer a greater profit on his dollar of sales. We could have got a greater profit on the sale of chewing gum, and incidentally, gum doesn't carry the profit for the jobber that we get on other items, and we have often contacted the chewing gum manufacturer to find out why they would not pack gum twenty-four count, the same as candy was packed, and they tell us that it can't be done because of the profit angle at the present time, and of course we are amazed when we find that they are doing it, and then some.

HENRY W. KING was thereupon called as a witness for the Commission, and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Forkner:

Q. Will you give the reporter your name and address at the present time?

A. My name is Henry W. King. My present address is 626 Wabash Building, Pittsburgh, Pa.

Q. How long have you been in the City of Pittsburgh?

A. Since March 28, 1947.

Q. With whom were you associated before that?

A. Rockwood & Company.

Q. And after 1945 you—

A. I was vice-president and general sales manager until I resigned on March 4, 1947.

Q. When you were general manager for the Middle West, you had a number of salesmen working under you and covering that territory?

A. I did.

Q. How does it happen he introduced you to Frank Anderson and Ralph Boid?

A. So far as I knew, they controlled the purchasing for the Automatic Canteen Company.

Q. When you first talked to them, what size count were you making in package size?

[fol. 254] A. Twenty-four count.

Q. What was that selling at?

A. Sixty-four cents.

Q. What bars, if you can remember, did you have?

A. Pecan Feast and Milk Feast.

Q. Did you quote that price to them on your first visit?

A. I probably did, yes.

Q. Tell us about the conversation you had with Ralph Boid, then, the first time.

A. The first time I undoubtedly offered him the Pecan Feast bars, and very likely the Milk Feast bars at 64 cents, and was told that—

A. I probably offered them Pecan Feast and Milk Feast, and they were not interested.

Q. What did Mr. Boid tell you when you made that offer, as best you remember?

A. I can remember pretty clearly, I think, because their policy was well known, that he told me they bought only

100-packed bars, and obviously they made certain savings by doing that, and they were ~~not~~ going to relinquish those savings. He asked me if I could quote him on Pecan Feast in 100 count.

Q. State whether or not he expressed any range, any price range, within which they were buying such candy?

A. I don't think on that visit he did, Mr. Forkner. I think later he did.

They first wanted to get a quotation on Pecan Feast in 100 counts, which we were not making at that time, and I had no authority from the company to quote it then.

Q. Did anything else happen during that first conversation?

A. It was left that I was to go back with the quotation on 100-count bars.

Q. Did you do that?

A. I did that.

Q. How much later would you say that second conversation was than the first one; that is, approximately weeks, months, or years? You had this first conversation, and, as I understand it, you didn't sell them any bars of any type until the year 1939, about two years later.  
[fol. 255] A. That is right.

Q. Between 1937, when you had your first conversation, and 1939 when you sold them some candy bars, did you have any conversations?

A. I had intermittent conversations with them because we were very much interested in getting their business, but, strictly from memory, I believe at that time we were not willing to pack 100-count bars, and the thing was held in abeyance.

After all, Rockwood & Company is not now, and never has been, a major factor in the five-cent bar field. We made a lot of bars—

Q. Did Mr. Boyd tell you why they wanted the 100-count bars?

A. For the saving obviously involved in the packing, and so forth.

Q. Was there any other factor mentioned in that first conversation as a saving to them?

A. You mean the sales cost? Of course, I think that was mentioned, too, about buying and selling all over the country through one outlet.

Q. Was anything mentioned about the advertising value?

A. Yes.

Q. What was said about that?

A. They said it was also obvious we would get a definite benefit from the wide distribution our bars would get in their machines, which had a definite advertising value.

Q. Were you or your company to take that into consideration in making a price to them?

A. I presumed they hoped we would.

Q. State whether or not they mentioned anything about f. o. b. factory by you, instead of having a delivered price as you had on your 24-count size?

A. I think they wanted an f. o. b. price—I am not sure—but I think the correspondence would definitely clear that up.

Q. Did they say anything about contacting their distributors in regard to making a sale of your product?

A. I don't know that they said anything about it, but I was aware, I believe, that they sold the distributors, themselves.

[fol. 256] Q. You say "they." When you say that you are referring particularly to Ralph Boid?

A. That is right.

Q. State whether or not during these different conversations you mentioned, Mr. Boid indicated that the price at which you were selling your candy bars was too high and he would not buy at that price?

A. He did that on my very first trip. They turned down 24-count bars at 64 cents.

We had only one pack at one price, and they were not interested in that pack at that price. It was a question whether I could make a 100-count pack for the Automatic Canteen Company. Such vending machine operators as we were then selling, small ones, we were selling a 24-count at 64 cents. They were the smaller vending machine operators, of course.

Q. That was the only count you could quote them on at that time?

A. That is right.

By Mr. Forkner:

Q. Tell about the negotiations you had on Pecan Feast bar. Start at the beginning and carry on down.

A. I started way back, and finally I was able to put sufficient pressure on the company to offer to make up a 100-count pack of Pecan Feast, which we then offered to the Automatic Canteen Company at \$2.30 a hundred—I think it was delivered. I am not sure, but I think it was delivered. That was in a letter that I have re-read.

During the course of the negotiations, they worked out about as follows: That at \$2.30 when we offered them the bar, we were losing money on them, but we thought the publicity and advertising value, and so on, would make it worth our while to take that loss on the bar.

However, Ralph Boid told me, as I quoted the company in my letters, that \$2.10 would be the maximum price that they could possibly pay for it, and I went back to the company with that price and they declined it, and the sales manager of that division at that time was Mr. Daugherty, who then took our price up with the president of the company, Mr. Jones, and he said he was willing to go as low as \$2.25 but that lower than that he was not willing to go because that was increasing our loss, and I offered the bars to Ralph Boid at \$2.25 in a letter, and he wrote a letter saying that they had taken the matter up and reviewed the policy of the executive committee, and they were sorry they couldn't do anything about it, so we did not sell them any bars at all.

Q. Tell us what you did when you couldn't sell them the Pecan Feast bar and why you did it?

A. I was wracking my brains as to how to get the Automatic Canteen Company on our books, because they were a very valuable customer, a very valuable account, and it dawned on me it was pretty much a matter of price.

We were selling at that time—and I think this is germane to the picture—very large quantities of buttermilk chocolate with a rum butter flavor to it, to the various chain stores and other people, and I suggested to the factory that if they would make up a five-cent bar with that flavor in it maybe we could get the Automatic Canteen Company to buy it from us and possibly it would sell. Then I didn't know what it would sell for.

• • • • •

Q. In any of your conversations, state whether or not Mr. Boid mentioned a price of \$2 for a bar you might make up such as the rum and butter bar.

A. Yes, he definitely did.

Q. Tell us about your negotiations on the rum and butter bar, using, if you desire, the different letters there which are now Commission's exhibits, for recollection only.

A. In the latter part of 1939, I think it was, we sold them the Rum and Butter bar. We got together on the price of \$2.

Q. I show you for the purpose of your recollection Commission's Exhibit 163-A.

A. It was 1939 that we sold the Rum and Butter Bar, and the price is \$2 a hundred delivered.

They tried that bar out in one or two of their branches, and it did not sell satisfactorily, so the net result of it was, as I remember, that they agreed to clean up the balance, and pushed it out, and that finished that.

We didn't sell them any more until 1943.

Q. Why did you make up this special bar, this Rum and Butter bar, in 100-counts?

[fol. 258] A. We made it up because we were very anxious to enjoy some of this wide distribution that they had, that we were not getting a share of, and my suggestion to make up the Rum and Butter bar was to meet their limitation as to price.

Q. Which was—

A. Ralph Boid stated to me that \$2 was not their limit necessarily, but that would be governed by the turn over of the bar, and it was more or less that figure. We were more or less working to that price, and I knew with buttermilk chocolate as opposed to milk chocolate and milk pecans as

opposed to pecans, we had a better chance to make that price.

Q. State whether or not he mentioned to you the resale price at which they were selling the distributors, and whether he stated the reason he said \$2, or approximately that?

A. Yes, I wrote the factory definitely on that. On February 1st—

Mr. Gravelle: What is the number of that exhibit?

The Witness: 165-N.

I stated in that letter that—this again went to the Pecan Feast bar negotiations—they are all mixed up again here—\$2.10 is the top price they can pay as their price to dealers all over the United States is \$2.45 on all the merchandise they handle. They would be stretching a point at \$2.10.

By Mr. Forkner:

Q. Were you quoting what Mr. Boid tells you in that letter?

A. I must have been quoting Boid because I certainly would not have given the factory anything but the truth.

Q. I am asking if you were quoting Mr. Boid as against Mr. Anderson?

A. Most all of my negotiations on price were connected with Boid and not Anderson.

Q. Would you still say that Mr. Boid told you that \$2.45 was their price on all merchandise they handled, when the record shows by Commission's Exhibit No. 5 that at that time it was \$2.70?

A. I still would go bail for the fact that that statement was made to me by Mr. Boid. Otherwise I would not have passed such definite and all-embracing information on to the factory.

[fol. 259] Q. There were several occasions on which you tried to sell the Pecan Feast, and after failing on that you sold the Rum and Butter bar?

A. That is right.

Q. Did you convey that information to Mr. Boid?

A. I did, by letter, Exhibit 165-W.

Q. Which is a letter dated August 20, 1940?

A. Yes.

Q. And you state in there that it is impossible to sell them at \$2.10, in spite of the advertising; is that right?

A. That is right.

Q. Did you tell them that personally, or is that the only indication he had on that?

A. I undoubtedly told him that same thing, more or less, by word of mouth, but at this point I confirmed it to him by letter.

Q. These factors you mentioned here about freight, f.o.b., 100-count, advertising value, and so forth, were named by Mr. Boid as factors that you should consider; and I ask were they mentioned just that one time, or was some of them mentioned at various times during the different negotiations?

A. I would assume they were brought up more than once because I was very conscious of them.

Q. You spent a lot of time and effort on this account?

A. You can say that again.

Q. What results did you get?

A. Zero, except for the rum and butter bar.

Q. And that was mostly experience, wasn't it?

A. Yes.

Q. Did you have trouble disposing of some of this candy when the Canteen no longer continued to buy?

A. I think we had a little trouble. There wasn't a large amount of it, so I don't think it was of any consequence.

Q. State how hard you tried to get Mr. Boid to take the 24-count instead of switching to a new count like the 100-count, between the years 1937 and 1939?

Mr. Gravelle: May we have the question read?

(Thereupon, the reporter read the last question.)

The Witness: I would say I didn't try very hard because I was convinced from the beginning that they would not buy anything but 100-count, and probably most of my selling effort was put on the factory to get them to make a 100-count to meet the customer's wishes.

[fol. 260] By Mr. Forkner:

Q. State whether or not it was a question of price principally that prevented your making sales of the Pecan Feast bar?

A. Obviously, yes.

Cross-examination.

By Mr. Howrey:

Q. This may be a little repetitious, Mr. King, but I am a little confused on your testimony with reference to Commission's Exhibit 165-H.

As I understood it, you testified that after refreshing your recollection from that letter, you could say that Mr. Boid tells you that \$2 was the price. Is it a fact that the first paragraph of that letter states that "He tells me that \$2 is not their limit of price, but that this limit is governed by the turnover of the bar"?

A. That is correct.

Q. Is that a summary of what Mr. Boid tells you about prices?

A. Yes, I would say that is.

Q. Does that represent your ultimate understanding of what he had in mind?

A. I would say that that was a qualification of Mr. Boyd's original statement to me that \$2 was about their limit.

Q. That this was a subsequent statement in point of time. Is that correct?

A. That is right. I believe so.

Trial Examiner Bayly: If the sale of this particular item went over pretty good, the door was open a little to re-adjust the price structure. Is that right?

By Mr. Howrey:

Q. The Rum and Butter bar which you did sell to the respondent in this case was a special bar made up for that specific purpose, was it not?

A. That is correct.

[fol. 261] By Mr. Howrey:

Q. You testified, Mr. King, that you were exerting every effort to place your product in the Automatic Canteen Company's line, and that in your opinion the reason you were unable to place the Pecan Feast there was because of the price angle. Is that correct?

A. That is correct.

Q. From your experience, don't you consider if the normal function of a buyer to buy at the best prices obtainable, and the seller to sell at the highest prices obtainable?

A. That is right.

Redirect examination.

By Mr. Forkner:

Q. Now, according to your experience and background, Mr. King, is it normal for a buyer to state that they resell their product at \$2.40 a hundred when the books and records show they sell it at \$2.70 a hundred?

Trial Examiner Bayly: If there is some exhibit in there showing a price, and a couple of David Harms wanted to get together and one wanted to buy and one wanted to sell, they might skid the rig a little.

The Witness: What is the question?

(Question read by the reporter.)

The Witness: No, it is not usual.

## Recross Examination.

By Mr. Howrey:

Q. Do you think Mr. Letts and Mr. Boid deliberately lied to you?

Mr. Forkner: I object to that. Mr. Letts was not in this conversation, and there is no testimony that Mr. Letts made any such statement.

Trial Examiner Bayly: Since counsel asked that, will the witness answer if he wants to? The objection is overruled.

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

[fol. 262] The Witness: My answer to that would be I doubt if they did, but judging from my letter of February 1st to Mr. Daugherty, Exhibit 165-N, I am as convinced as I can be that Mr. Boid tell me that \$2.40 was their delivered price to dealers all over the United States or I certainly would not have passed that information in writing to the factory.

Mr. Howrey: That is all.

L. A. DALY was thereupon called as a witness for the Commission, and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Forkner:

Q. Now, when was your first sale made to the Automatic Canteen Company of America?

A. February, I think, 1939.

Q. And in what size count did you make that sale?

A. One hundred count.

Q. Had you made 100 counts before that?

A. Not that I recall.

Q. State whether or not you made that on an f.o.b. basis?

A. To our trade in general we sold f.o.b. Pittsburgh, full freight paid up to \$1.50 per hundredweight freight allowances.

Q. How did you change that in connection with sales to Automatic which started in 1939?

A. We gave Automatic Canteen a price of \$2.25 per hundred bars with a freight allowance of 50 cents, the bars being f.o.b. Pittsburgh. That was 50 cents a hundred-weight.

Q. Is that price lower per bar than the price at which you were then selling to any other customers?

A. Figuring deals, it wasn't any lower.

Q. I am just talking about the actual price, not your margin of profit nor your cost of production. I want to know if your figure of \$2.25—

A. That was lower.

Q. —or .0225 per bar was lower?

[fol. 263] A. That is lower than to other customers.

Q. Now, was that a change so far as method of freight, delivery; and competition is concerned, over what you had been selling at to others up to that point? That was a change?

A. Yes, that is right.

Q. And the hundred count was a change?

A. Yes.

Q. And what other factors did you take into consideration at that time in making a price of \$2.25 per hundred?

A. Well, the main factor that we had in mind in making our price was the distribution that Canteen could give us in a large part of the United States where our sales cost were very high and where we needed distribution, and where our candy would get to the consumer in a fresh and wholesome condition. That is the main factor.

Q. Did anybody else tell you about that except Mr. Boyd of the Automatic Canteen Company of America?

A. He could have possibly; I don't remember.

Q. Now, did you put any valuation on that distribution at that time and make a deduction from the price in order to reach the price of \$2.25 per hundred in 1939?

A. We estimated the value.

Q. What was your estimate of value?

A. We estimated around 10 percent.

Q. That amounted to how much per hundred bars?

A. That would be around 25 or 30 cents, in that neighborhood.

• • • • •  
Q. Now, you continued to sell the Automatic Canteen Company of America at \$2.25 net, billed them for \$2.50, and gave them a credit of 25 cents for distribution, on down to about year?

A. Until February, 1942.

• • • • •  
Q. At the same time other customers who were vending machine operators were also buying 100-count at \$2.65 per hundred, who did not get the price of either \$2.35 or advertising discount?

A. All orders placed by the vending machine operators prior to the advance to \$2.65 received a \$2.50 price. If we had the order we handled that the same as we did the Canteen. We were behind on shipments, and all orders we received during the period at the price of \$2.50 was in effect [fol. 264] was shipped, the same as the Canteens were shipped.

Q. Did they also get the 25-cent advertising discount per 100 pounds?

A. You are referring to independent—

Q. Independent.

A. No, no, they didn't get it. That is a flat price of \$2.50.

• • • • •  
Cross-examination.

By Mr. Howrey:

Q. When you take into consideration, say for the year 1939, the special offers and deals which were made to jobbers as shown by Commission's Exhibit 310, and all other deals which might be in vogue at that time, isn't it true, Mr. Daly, that there was no differential in favor of the Automatic Canteen Company as against the jobbers?

**MICRO**

**TRADE**

**CARD**

**MARK**



**3,328**



**53**

A. In practically all cases as shown on Exhibit 310-A, the price to the jobbers was as low and, in some cases; lower than to Canteen.

Redirect examination.

By Mr. Forkner:

By Mr. Forkner:

Q. I notice in footnote F to Exhibit 293-R, that you say that you are attaching data in connection with special offer sold to jobbers in various territories, together with the price. Is that correct?

A. That is correct.

Q. Now, in connection with that, when you refer to Commission's Exhibit 310-A through 310-E, will you tell me whether or not that includes just a part or all of the deals which you had during those years?

A. I would say that that represents 85 percent of the deals. There may be some others that we do not have a record of.

[fol. 265] JOSEPH BIANCO was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Cross-examination:

By Mr. Gravelle:

Q. Did you offer any free deals in your manufacturing business?

A. I don't think there is a candy company that did not offer any free deals in the '30's. I did.

Q. That, of course, affected the price that you received, and also affected your cost, did it not?

A. My deals were mostly composed of premiums. We used to give premiums, and it did not affect the selling price, because we would give a pocketbook with 12 bars of candy or a comb set to the salesmen as an inducement to sell it.

Q. It did not affect your price, but those items did enter into the cost of your product?

A. We charged it to advertising.

Q. You charged it to advertising in your profit and loss?

A. I suppose so. You would have to do that.

Q. Your profit would be, of course, reduced accordingly by the amount of those expenditures?

A. That is correct.

Q. Isn't it a fact that a great many candy manufacturers gave free deals during the prewar period, such as Curtis, Ludens, D. L. Clark, and others?

A. Yes, that is true.

Q. It was a common practice, was it not?

A. Correct.

Q. In connection with some of these deals, isn't it a fact that you would buy so many boxes of 24 count and they would give you so many extra candy bars?

A. Yes and no. Here is how they would work it. They used to have a deal where they would put 24 bars of candy in a box and give you three bars free. But the three bars were hooked on the cover of the box and it said on the box that these three bars are for you storekeepers and they are [fol. 266] free. It did not reduce our cost and we sold the box for the same price.

Q. I believe you testified you gave away pocketbooks and other items as free deals. Did you offer any such items to your vending machine operators?

A. Yes, because the deals were always with so many boxes of pocketbooks and naturally the vending machine operator would take it because he would like to have a pocketbook, too.

Q. Did you offer anything else besides pocketbooks to vending machine operators?

A. Yes, but the vending machine operators were not in business at that time, and I will tell you what else I offered in the same deal. I offered to the jobbers, I offered to the

vending machine operators, and, if I remember correctly, at one time we had a straw hat deal and at one time we had a comb and brush set. That is all I can remember.

Q. If the vending machine operator did not want the straw hat or pocketbook, did you offer any reduction in price in lieu of that?

A. No, it was only a choice of taking the straw hat, because if they were not selling so much during one time, there was no premium.

BEN LEFKOWITZ was therupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Did you give your personal address to the reporter, Ben?

A. 3031 Calvert.

Q. Where is the Auto City Candy Company located?

A. 2937 St. Aubin, 2937 St. Aubin.

Q. Is that a partnership?

A. It is a corporation.

Q. Oh. And who is associated with you in it?

A. Mr. Levy.

Q. What type of business is the Auto City Candy Company engaged in?

A. They do a wholesale candy and tobacco business.

[fol. 267] Q. Now, state whether or not any of the following named companies, C. S. Allen Corp., Fred W. Amend Co., Barbara Lee Choc. Co., Paul F. Beich Co.

The Witness: May I interrupt him?

Trial Examiner Bayly: What do you want to say?

The Witness: I want to say none of those offered me because I have read the names over myself, too.

Mr. Forkner: No. His Honor has made a ruling now.

Q. (Continuing.) — Bon Candies, Inc., E. J. Brach & Co., Bradas & Gheens, Bradley Smith Sales, Bunte Brothers, Cardinet Candy Co., Chase Candy Co., Chocolate-Menier, D. L. Clark Co., Community Industries, Cream-O-Specialty Sales Co. Inc., Curtis Candy Co., Dante Candy Co., Delicia Chocolate & Candy Mfg. Co., Douglas Candy Co., Euclid Candy Co. of California, Euclid Candy Co. of Illinois, Euclid Underwriting Co., Fisher Nut & Chocolate Co., D. Ghirardelli Co., D. Goldenburg, Inc., Hamilton Candy Co.; Wm. H. Hardie Co.; H. J. Heinz Co.; De Witt P. Henry Co.; Hershey Chocolate Corp.; Hollywood Candy Co.; I. M. Hoyt & Co., Inc.; Kerr's Butterscotch, Inc.; Kimbell Candy Co.; M. J. Holloway & Co.; Imperial Candy; Walter H. Johnson Candy Co.; Kelling Nut Co.; Kraft Cheese Co.; Lamont, Corliss & Co., Life Savers, Inc.; Ludens, Inc., The MacKenzie Candy Co., Mars, Inc., Mason, Au & Magenheimer Conf. Co., Melster Candy Co., Minter Brothers; J. J. Myers Industries, New England Conf. Co., J. T. Newland Candy Co., Ostler Candy Co., Peter Paul, Inc., Peanut Products Co., Plants Nut & Chocolate Co., Queen Anne Candy Co., W. F. Schrafft & Sons, Inc.; Konrad Schrier, Schultz Biscuit Co., Schutter Mfg. Co., Seavey's Sweets, Shotwell Mfg. Co., Shupe-Williams Co., Sisco-Hamilton Co., Spergy Candy Co., Squirrel Brand Company, Sweet Candy Co., Sweets Co. of America, Inc., Switzer's Licorice Co., Terry Candy Co., Trudeau Candies, Inc., Billy B. Van, Inc., F. B. Washburn Candy Corp., Wayne Candies, Inc., Webb Candy Co., Wilbur-Suchard Chocolate Co., Williamson Candy Co., Homer J. Williamson Inc., Wright Candy Co., Zion Industries, Inc., George Ziegler Co., Wm. J. Wrigley, Jr., ever offered to accord to you or make available to you any of the following savings in making a price to you; first, the saving resulting in buying f.o.b. factory?

A. No.

Q. Second: the saving resulting from elimination of seller salesmen costs?

[fol. 268] A. No.

Q. Third: the saving resulting from elimination of returns for stale or unsaleable candy? In other words, if you wanted to send back candy they would give you a reduction in price. Let me put it —

A. Can I answer it the way I want to?

Q. Sure.

Trial Examiner Bayly: Well, answer the question yes or no and then explain it.

A. No. Such return is concerned when the retailer sells to the consumer; if he has any merchandise on his shelf and if the stuff is not good the factory doesn't want it to go to the public, anyhow. So we don't have to return it. In other words, the manufacturer says if we don't return any goods to them—and that is the reason they give us the discount. There is not much that goes back to them.

Q. That is defective or stale?

A. That is right.

Q. Did any of these companies offer you or give you a lower price if you wanted to return any goods?

A. No.

Q. Did any of these companies offer to give you savings from elimination of free goods or discount deals, that is, if they didn't give you a discount they offered to give you an equivalent discount?

A. No.

Q. Would you have taken it if they offered it?

A. Yes.

Q. Why?

A. Why, it is a saving. I could have made a profit on it. The deals didn't mean anything to us.

Q. Why didn't it?

A. The balls and bats, and what have you? Pass them on to the retailer. They didn't mean anything to us. It is the extra profit. We had to buy maybe a whole lot of that stuff from Curtis Candy Company we couldn't use. So we bought that merchandise and got deals; at the end of the season we had a lot of merchandise on our hands, we couldn't use it. Of course, they had to take it back from us. A deal doesn't mean a thing to a jobber.

Q. Would you have been willing to have accepted a lower price based on these elements that I have just mentioned here if it had been offered to you by these different suppliers?

A. Yes.

[fol. 269] Mr. Howrey: If your Honor please, I object to the question and ask the answer to be stricken upon the ground that it is irrelevant to the issues in this proceeding what this gentleman would have done had something else been done. He is not a party to the respondent and the relationship between Curtis and himself is not the issues and it is too speculative.

Trial Examiner Bayly: We have got to approach the question of measure of damages directly and head-on, and the testimony must come within the rule of certainty. Now, if it had been offered him, did or would he have taken it? I think that is too speculative and remote. Objection sustained.

Budd J. MENDEL was therupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner.

Q. What is your business and personal address, Mr. Mendel?

A. My personal address is 13725 Dexter Boulevard. My business address is 1111 E. Eight Mile Road, Ferndale, Michigan.

Q. Are you with Lee & Cady, Incorporated?

A. I am.

Q. Located at 1111 E. Eight Mile Road, Ferndale?

A. That is right.

Q. Is the Lee & Cady firm a wholesale confectioner?

A. We are primarily wholesale grocers.

By Mr. Forkner:

Q. Of the 93 companies which you examined on which exhibits were in the record, how many did you buy of?

A. Probably sixty or more.

Q. And in the majority of cases, what did you pay for the candy before the war and what did you pay for it after the beginning of the war?

A. The general run of prices prior to the war was 64c [fol. 270] for a 24 five-cent box. Since the war, since the latter part of early 1942, the price advanced to 68, 72, 74, 75, 80¢, different types of bars at different periods of the war period.

Q. And up until the beginning of 1946, was the price 68¢ for 24 count?

A. Beginning of 1946?

Q. Up until then, from 1942 on.

A. 68¢.

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Q. As to all these companies you have named in the record, state whether or not any of them offered or whether they all offered to make available to you, for instance, 100 count.

A. They did not offer those counts, and we were turned down when we requested them.

Q. State whether or not you were offered any reduction in price resulting in savings by any of these companies if you would buy f.o.b. factory?

A. No.

Q. Were you offered any reduction in price by reason of savings resulting from elimination of a salesman's costs if you were sending your orders by mail?

A. No, sir.

Q. Were you offered by any of these companies a lower price resulting from savings if they didn't give you any free deals or discount deals? In other words, you would have a choice you could take the deal and have a reduction in price.

A. We had no choice. We were offered these deals and that was it. We didn't want the deals because it meant hauling additional tonnage in our trucks, but they didn't give us the merchandise without the deals. We had to take them or leave them.

Q. Were you offered any savings resulting from the elimination of returns for stale and unsaleable candy?

A. No, sir.

Q. By any of these suppliers?

A. No, sir.

[fol. 271] Cross-examination.

By Mr. Gravelle:

Q. Now, you testified regarding the prices that you paid in comparison with the prices that the respondent, the Automatic Canteen Company, paid, and you testified that free deals, as I recall, did not affect your prices as a jobber.

A. That is right.

Q. Isn't it a fact in connection with these many free deals that it involved additional candy you were given and additional bars?

A. Free deals in most cases included additional bars, either penny or nickel bars, which we were giving to the independent retailer. We did not keep it. The deals like that only cost us money, hauling the candy.

Q. You did not have to pass that candy down free to the retailer unless you wanted to?

A. That was the understanding with the manufacturer, that we must give them to the independent dealer.

Q. Was that in writing or just oral?

A. Oral.

Q. Assuming that the record shows that the D. L. Clark Company over a period of years involved in this proceeding, gave great many free deals; and assuming that Mr. Daly, the sales manager, testified that their prices to the jobbers were as low, or lower than, the prices to the respondent on account of these free deals, would you agree with his testimony or not?

A. Without looking at the records, I cannot agree with him, because I do not know. I do not have the records handy.

Q. What is that based upon? What experience is that founded on?

Trial Examiner Bayly: He already testified that it actually required less hauling if they did not have it; and if they did, it would take more work, and they usually passed it on to the other fellow. And therefore his answer is obvious. It is just a pain in the neck.

The Witness: That is right. And how!

[Vol. 272] By Mr. Forkner:

Q. But that is deals passed on. But there were a few deals that benefited the jobber. As to those, how would you handle it?

A. There were less than one-eighth of one per cent, and you can figure it out on the total volume of my business.

Q. That is what?

A. Free deals that we benefited from.

Q. Even as to those, state whether or not you were in favor of deals that would benefit you?

A. We were not.

Q. Why?

A. We don't like the odd deals. It puts the buyer on the spot. Especially with the Curtis Candy Company. I told Mr. Schnering, of that company, years ago, I said, "I don't believe anything you tell us. One month you come around with one deal, and then another week with another! We never know where we are!"

ADAM T. LEIB was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. What is your name, please?

A. Adam T. Leib.

Q. Your address is 1417 Berneau Avenue, Chicago, Illinois?

A. Yes, sir.

Q. And you have been a broker in selling candy, gum, and peanuts?

A. Candy and gum.

Q. Candy and gum?

A. Yes, sir.

Q. How long have you been in the brokerage business?

A. Well, it will be about fifty years, that is about all I ever done.

Q. Did you quote Mr. Boyd a price on the twenty-four count?

[fol. 273] A. Yes, sir.

Q. What price did you quote to him?

A. Sixty cents.

Q. Was that f.o.b.?

A. Yes.

Q. Was that your regular price? Your regular price at that time, was it?

A. Yes, sir.

Q. Would you state whether or not you told Mr. Boyd that was your regular price between individual jobbers and the manufacturers?

A. Yes, sir, I stated it to him that way. It was a package that was more than the ordinary bar, and that was the best price we had to offer anybody.

Q. And you talked to Mr. Boyd again?

A. Yes, sir.

Q. And what did Mr. Boyd tell you then, about your, if anything, about your sixty cent price?

A. He said your price was out of line in regards to the other people they were buying the candy from.

Q. Yes.

A. The five-cent package.

Q. Did he state whether or not he could do business with you?

A. I said, "That is the best price we can make on account of it costs more to make that chip than the ordinary bar."

and he said, "Well, we may have room for your item a little bit later."

Q. Yes. Now state whether he said anything about the size of count in which they bought candy bars, the size package.

A. Oh, yes. Well, he said that they bought most of the bars in hundred package, that is, one hundred packages to a carton.

Q. Did he give you any reason why they wanted it that way?

A. Yes, get them cheaper that way.

Q. Now, state whether or not he said anything about his volume of business in this conversation?

A. Well, he said, "Of course, you know we do a very large business all over the country, and our expenses are heavy, and we have to buy as cheap as we can."

Q. State whether he said anything about salesmen's commissions or buying direct from a factory?

[fol. 274] A. He said, "We buy direct from the factory only. We do not buy through salesmen."

Q. What did you tell him then?

A. I told him I was direct from the factory, and the commission didn't count in there at all.

Q. You were receiving five percent on any sale you might make?

A. Yes.

W. C. DICKMEYER was thereupon called as a witness for the commission and, having been first duly sworn, testified as follows:

#### Direct Examination.

By Mr. Forkner:

Q. Where did you first have any contact with any one connected with the Automatic Canteen Company of America?

A. I called on Mr. Boid.

Q. Who is he?

A. Purchasing agent for the Automatic Canteen.

Q. Were you also making a 100-count bar at that time?

A. I think we were, yes.

Q. What was that selling at that time?

A. \$2.60 to the vendors.

Q. Now, will you give us in general according to your best recollection the substance of your conversation that you had with Mr. Boid when you first talked to him at the Merchandise Mart?

A. It is a long time back but—

Q. Do it the best you can.

A. I recall we felt we might use a little additional business. We were selling to the jobbers and had a nice business with them and a small amount of business with vendors; and I called on Mr. Boid to see whether there might be a possibility of serving them.

Q. Yes.

A. As I recall it, I said to him, "I just came in to find out what price we would have to sell you people [fol. 275] approximately to get your business." I don't recall exactly what he said in answer to that, but we did quote them a price of \$2.05 according to my recollection, my best recollection.

Q. State whether or not he gave you a figure at that time of what you would have to charge in order to get the business?

A. I don't recall that he gave me any figure.

Q. Did he give you a range in which you would have to—

A. He may have given me a range, I am not sure.

Q. Go ahead. I am sorry I interrupted you.

A. We quoted them a price.

Q. Oh, you quoted them a price. Now, let's come back to the conversation. Tell us the rest of it, the rest of the conversation.

A. Of course, this is all so far back that it is difficult for me to recall, but I do remember that he said "We buy an

an F.O.B. basis. You won't have any freight to pay and we assume there is no selling cost involved in your sales to us."

Q. Salesmen's commissions?

A. Salesmen's commissions, and he mentioned the fact that they pay their bills promptly, no credit risk, and there are no returned goods, and perhaps some other savings I may have indicated, but that was as nearly as I can remember some of the things that he mentioned which might be taken into account by us in quoting our price.

Q. Those facts were stated to you by him as you stated for the purpose of having you consider them in making a price, a lower price, to them?

A. That is right. Obviously, if we have to pay the freight we have to have that in our price. If they pay the freight they are entitled to a lower price.

Q. These facts were mentioned to you in connection with making a price to them?

A. As I recall,

Q. You didn't make a price to them then at that time, your first conversation?

Mr. Howry: I object, Your Honor, to a question like that. Witness has stated that he quoted Automatic Canteen a price of \$2.05.

The Witness: I didn't say I quoted that to them at the first conversation. I said that we later quoted them a price of \$2.05 which I know I did not quote him on the first call, [fol. 276] We went back home; I wouldn't have done that on the first call any way. We go back home and see what savings we might effect and whether we could handle this business at approximately the same profit that we have with other businesses, and then I think I either quoted him a price verbally on a later call or—I don't remember.

By Mr. Forkner

Q. Well, as a matter of fact, you had not made up a price based on those different elements when you first called on Mr. Boid?

A. No, I had no knowledge at all of what was expected. I went there entirely oblivious to any information as to what their practice was or what they expected.

Q. Did you tell him in the conversation with you that you were making a 24-count at .64 or the 100-count at 2.60 at that time during that conversation?

A. I don't recall.

Q. Now, before the war when you sold the jobbers, did you have any deals or free goods or premiums?

A. We had a few, but very few. We sold our goods on regular terms at the regular prices and we seldom engaged in that type of business.

Q. Now, the question about whether or not you, when you had these deals you mentioned, did you offer to any jobbers or any customers other than Automatic the privilege of having an equivalent discount instead of taking the deal of a premium or whatever it was?

A. No.

Redirect examination.

By Mr. Forkner:

Q. Did I understand you to say that in your first conversation with Mr. Boid or in any conversation you have a recollection of a price being given to you or suggested to you by Mr. Boid at some time during the negotiations or dealings with him?

A. I think he did suggest a range that they were buying in that I might use as a determining factor in quoting our price. That is my recollection.

[fol. 277] H. A. Gibbs was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Now, Mr. Gibbs, how long have you been with the Henry Heide Company?

A. Since 1931.

Q. 1931?

A. Right.

Q. Are you still with Henry Heide Company?

A. I am.

Q. Now tell us about your discussion as best you remember it with Mr. Boyd at that time.

Trial Examiner Bayly: Having to do with the price and the packaging and things like that.

A. Well, at that particular time we had two different types of packing. We had a 24-count and 60-count packing. As I recall, our price was around 64 cents, I believe, for 24-count goods and I think our 60-count packing—can I refer to a note I might have on that?

Mr. Forkner: Sure.

A. We had a 60-day price of \$1.45, no freight.

By Mr. Forkner:

Q. Did you quote those prices to Mr. Boyd?

A. I did.

Trial Examiner Bayly: What was said that got you fellows to agree on this price that you obviously made.

By Mr. Forkner:

Q. Just give us your substance of what you remember.

A. Well, as I recall, there was an advantage in selling the 100-count packing to them. I am just trying to think.

Elimination of free deals, I believe, was one and the saving of boxes, such as, well, let's see; 24-count boxes would be equivalent to a saving of three or four boxes to a hundred count. I think the matter of prompt payment of bills was mentioned. Elimination of return goods on account of spoilage and non-salability.

Q. State whether anything was said about advertising value:

[for 278] A. I think some reference was made to the advantage of having your merchandise placed in machines all over the country.

Q. Now, in these conversations did Mr. Boyd indicate any price or prices that you would have to have in order to sell to him?

A. Well, I believe reference was made that they were buying goods around \$2.00 and less a hundred.

Q. State whether anything was said as to whether the bar they bought would have to be the same weight and quality.

A. Yes, I remember his saying it must be the same weight and quality.

Q. With that background and experience and having in mind this situation and keeping in mind the different factors involved, what is your opinion as to why you didn't sell the Automatic Canteen Company back there.

Trial Examiner Bayly: What are the facts; not an opinion.

By Mr. Forkner:

Q. Well, what is the fact why didn't you sell them?

A. Well, I wonder if I can state a fact. It is an opinion as far as I am concerned. My price was too high.

Q. Well, what effect, if any, did that have on your business when other companies sold that.

Mr. Howrey: Your Honor, I think you ruled you wanted facts and not opinions and I think the witness gave an opinion.

By Trial Examiner Bayly.

Q. Can you state, Mr. Gibbs, why you couldn't sell? Was it because of the price or why didn't you sell them?

A. Well, I think Mr. Boid gave me a partial reason that the piece had not met public acceptance in the markets wherever it was placed.

Q. Now, as a matter of fact, didn't Mr. Boid tell you that after you had reached an agreement that he would put your bars in some vending machines and test them to see how they went and if they went all right he would order more from you?

A. I think that was the talk, yes.

Q. And didn't he also tell you later that they didn't have [fol. 279] a good public acceptance and wasn't that the reason he gave you at least as to why he didn't buy any more from you?

A. I think that was discussed.

Q. He said that, did he not?

A. Yes.

WALTER BANNON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Would you give your name and address to the reporter, please?

A. Walter Bannon.

Q. And your address?

A. 7726 Marquette, Chicago.

Q. What company are you associated with?

A. Regal Candy Company.

Q. How long have you been with them?

A. A trifle over five years.

Q. Do they make five cent candy bars?

A. We do.

Q. What bars?

A. Carmel Nut Chew Bar.

Q. In what market do you sell that bar?

A. We sell throughout the entire country.

Q. And what type of customer do you sell it to?

A. All types except retailers.

Q. And your position is what with it?

A. Sales manager.

Q. Now, with what company were you connected before you were with the Regal Candy Company?

A. Dante.

Q. And how long were you with Dante Candy Company?

A. About nine and one-half years.

Q. From what year to what year?

A. 1932 to 1942.

Q. And what position did you have with the Dante Candy Company during that time?

A. I was sales manager.

[fol. 280] Q. Now, Mr. Bannon, who did you talk to, when you had changes in price from 1936 on down, in selling to Automatic Canteen Company of America?

A. First Mr. Anderson and then Mr. Boid.

Q. Well now, from 1936 on down, would that be?

A. I think it was mostly Mr. Boid.

Q. All right. What position did he have with the Automatic Canteen Company?

A. Mr. Boid?

Q. Yes.

A. I understand he was the director of purchases.

Trial Examiner Bayly: All right. Proceed.

The Witness: We were selling the Canteen at \$2 a hundred in 1936, and, I believe, up until 1938, according to the chart, 1939, and then we were told that we might get a little more business if we dropped the price a couple cents a box.

By Mr. Forkner:

Q. And you dropped it to \$1.98?

A. We did.

Q. That was in 1939 or 1938?

A. 1939, according to your chart.

Q. There is nothing shown on 1936; if I might mention, no records, so there is nothing shown there. Who told you that?

A. Mr. Boid.

Q. Did Mr. Boid ask you to take into consideration certain factors, reasons why they were entitled to such a price of \$1.98?

A. Yes, he did.

Q. What were those?

A. Quick national distribution, savings in cartons and boxes, no credit losses, no returns, no commissions.

Q. What do you mean by no commissions?

A. No broker and commission to salesman.

Q. Did he mention anything about f. o. b. factory?

A. Yes, that was always mentioned.

Q. I think you mentioned f. o. b. factory, elimination of sales, from sales cost, the 100-count size instead of smaller size.

A. That is right.

[fol. 281] Q. Did you mention anything about no returns for stale or unsaleable candy?

A. Yes.

Q. Now, in any of these conversations with Mr. Boid, did he mention about the fact that they would not want deals and should therefore have the equivalent price deduction?

A. Well, he mentioned always that he wanted the rock bottom price leaving everything off.

Q. Leaving everything off?

A. Yes.

Q. What did he mean by leaving everything off?

A. Well, the things that I just mentioned, no commissions, 100-count, and no credit losses, no return goods, things of that kind.

Q. Did Mr. Boid also, in any of his conversations, mention anything about the wide distribution?

A. He did.

Q. What did he say on that?

A. He said that he could give us national distribution; in other words, get it into places where we couldn't ordinarily get in. It was an advertising plan to some extent.

Q. Well, was that mentioned in connection with price, in the price you should give him?

A. Well, it was mentioned as one of the advantages.

Q. Or one of the factors that you should consider in making a price to him?

A. Yes.

Q. Mr. Boid knew your price, didn't he, on your 24-count?

A. Yes.

Q. Did he also know your price?

Mr. Howrey: I object and ask that the answer be stricken. I don't know how this witness could know what Mr. Boid knew.

By Mr. Forkner:

Q. Well, in your conversations you talked at times about 24-count price, didn't you?

A. I did.

[fol. 282] Q. And didn't you also talk about a 100-count price that you were selling at to others?

A. I did.

Q. And told Mr. Boid what your prices were?

A. Yes, sir.

Mr. Forkner: Cross-examination.

Cross-examination.

By Mr. Howrey:

Q. And the only information you have about being cut off is your failure to get as big a volume of orders now, as you did during the war, is that correct?

A. That is partly it, and the statement that the man prior to Mr. Conix made to us. What was his name, Mueller? He told me on the telephone, or he asked me what cut the Canteen was going to get out of this business, and I told him none and he said, "Well, then, you don't need to expect too much business from us from now on."

Q. What cut the Canteen Company was going to get out?

A. Yes, what commission they were going to get, and I told him we could sell all of our products without giving a cut to anybody.

The Witness: Well, the finish of that question was that we got very little business after that.

By Mr. Howrey:

Q: Do you know that Mr. Mueller is now dead?

A. I do.

Q. Would you make the statement that he asked for a cut in your business if he were alive?

A. To his face.

Q. Do you mean to sit there and tell me under oath that Mr. Mueller asked for a cut from you?

A. I do not mean for himself but for the Canteen Company.

Q. What kind?

A. He didn't say, but I assumed it would be five percent, which would be a regular brokerage cut.

Q. Now, you testified that you had conversations with [fol. 283] Mr. Boid about quick national distribution, savings in boxes and containers, no returns and allowances, no commissions, f.o.b. factory, free deals and you testified, I believe, that that all occurred in 1938, is that correct?

A. Approximately.

Q. And each time Mr. Boid gave you this dissertation which you have testified to about these various items, is that correct?

A. That is right, to hold the price down.

Q. Were you trying to get it increased at each time you submitted?

A. No, not until it was absolutely necessary. But we finally found it was selling at such a low price we couldn't make any money and we had to go to him to get a little relief.

Q. And each time you went to him, even though there was no desire on your part to get a higher price—I am talking now about between 1936 and 1938—and no attempt on Boid's part to get a lower price, he still outlined all of these various items, is that your testimony?

A. That is right, and at the time we gave the \$1.98 price, that was pushed down from \$2.

Q. That was two cents a hundred difference?

A. That is right.

Q. You don't mean to testify that Mr. Mueller or the Automatic Canteen Company wanted a five percent cut on your business, meaning a check running from you to them, do you?

A. Not necessarily a check, but it should be reflected.

Q. How do you interpret?

A. Just the way he told me. He said, "What are we supposed to get out this? Are we supposed to sell it to our distributors at the price we pay for it?"

Trial Examiner Bayly: Call your first witness.

Mr. Forkner: I would like to call at this time, Your Honor, Mr. H. A. Melster of the Melster Candy Company, Cambridge, Wisconsin.

[fol. 284] H. A. MELSTER was therupon called as a witness, on behalf of the Commission and, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Forkner:

Q. Are you president of the Melster Candy Company, Cambridge, Wisconsin?

A. I am.

Q. And how long have you been president?

A. Since July first of last year, 1946.

Q. And what position were you occupying before that?

A. Vice-president.

Q. And how long have you been in the Melster Candy Company?

A. Since we started in 1919.

Q. Are you the principal stockholder?

A. No, I am not. It is a family corporation, and we each hold equal shares.

Q. Is that a Wisconsin corporation?

A. Yes, sir.

Q. Your home office is Cambridge, Wisconsin?

A. Correct.

Q. Besides yourself as president of this company, who are the other officers, like treasurer, secretary, etc.?

A. My brother, A. E. Melster, who is secretary and treasurer; and my father who is vice-president.

Q. What is his name?

A. G. J. Melster.

Q. Are there any more officers of the firm?

A. No.

Q. Would you give the names of those who are on the board of directors?

A. The three I just mentioned, and my wife, Doris Melster, and my brother's wife, Loretta Melster.

Q. I take it that the company has been operating since 1919?

A. That is correct.

Q. Now, have you been making five-cent candy bars since that time?

A. Yes, sir.

Q. To what class of trade have you sold candy bars since 1937?

[fol. 285] A. We have sold the retail trade and the jobbers, and vending machine accounts.

Q. State whether or not Mr. Boid wanted a lower price per bar than \$2.67 per hundred which was the price your twenty-four count would be at sixty-four cents.

Mr. Howrey: If Your Honor please, I object to that question. What Mr. Boid wanted, we all want things, but I think the testimony should be limited to conversation.

Mr. Forkner: I am sorry. I meant conversation which indicated he wanted.

The Witness: As I indicated a while ago, I don't remember the exact conversation that took place. I do remember this, however. When we began to get down to talking about prices on the matter, he did say, "And now in figuring your prices, remember that you have no salesman's commissions." The Canteen Company paid the freight, and there was a definite saving as far as boxes were concerned from 24 count to 100 count, which of course we realized before he ever brought that out. I do recall saying, "What price are you paying, what price would you want to pay for this?" That I do remember. The only answer I got from Mr. Boid was, "We don't dictate any price because we don't want any blood on our hands." That was exact wording.

Q. Well, now, may I ask you this: State whether or not in selling to these other vending machine companies that you have mentioned in the record here like Card, or Tessman, or like this Carmel, this jobber, did you make available to them also the savings resulting from the elimination of freight, elimination of 24 count—substitution of 100 count—elimination of salesmen's expense?

A. No.

Trial Examiner Bayly: The objection is overruled; and the answer may stand. Proceed.

The Witness: Well, no, we didn't. I don't think we did make it available, because I say our price was different because we paid freight and our salesman called on them.

[fol. 286] By Mr. Forkner:

Q. Did you offer not to have your salesmen not call on these parties and give them a lower price by reason of that?

A. No.

Q. Did you offer to have them buy FOB and get a lower price?

A. I don't think so.

Q. A lower price on account of boxing?

A. We did give a lower price on boxing. It was only freight and commission involved. We gave them what savings were available when we could.

Q. Have you ever figured up your difference in doing business with the Automatic Canteen Company as compared to these other customers on a cost basis?

A. No.

Q. At any time?

A. Oh, I suppose we did do some figuring on it, but I would not have those figures at the present time.

Q. In column 6 you put down there "no record." That is on the 100 count to other than Automatic? Does that refer to some of these customers you mentioned at Milwaukee and Madison like that blind man?

A. That is right.

Q. You have no record of those?

A. No, from memory, I would say around \$2.25 to \$2.30.

M. T. Sigrid was therupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner.

Q. Would you give the reporter your full name and address?

A. Mark T. Sigrid, 121517 East Main Street, Merrill, Wisconsin.

Q. And are you connected with the Merrill Candy Company?

A. Yes, sir.

[fol. 287] Q. And what position do you occupy with them?

A. Secretary and treasurer.

Q. How long have you been secretary and treasurer?

A. Since 1929.

Q. Now, will you give us in substance as best you remember your conversation with Mr. Boid at that time?

A. We first stated that their distributor in our city would like to see the bars in their canteens there and, of course, we wanted to go further yet, further distribution. So we asked them to allow us to put in this bar, Skee Skooter bar. Then, of course, we got to talking prices and they indicated, Mr. Boid indicated they could not pay \$2.50 per hundred. Somewhere around \$2.20 or \$2.25 would be more in line. He asked us to go back and refigure our cost, see what we could do. But we still felt that we could make no concessions further than that.

Q. Well, in this conversation, state whether Mr. Boid mentioned any factors or reasons why they should have a lower price than you were selling at to others on the 100-count?

A. Oh, yes.

Q. What were those?

A. The saving, first, of the selling costs, and the freight cost in delivering because the others were delivered, 24-count, and bad account losses, and I believe no return goods was mentioned. I think that was the main—oh, the difference in the cost of cartoning on the 24-count and 100-count cartons would be a saving.

Q. He mentioned all those factors?

A. That many I know of, yes.

Q. Did he mention anything about advertising value or of distribution?

A. Not that I remember.

Q. Now, what reason did he state that he was mentioning these different factors to you for, if any?

A. In order to purchase.

Q. Was it, in other words, that he be given a lower price?

A. Yes, sure, they wanted a lower price in order to handle our merchandise.

Q. What did you tell him?

A. I told him we couldn't meet such a price. We wanted to make a profit or not sell at all.

[fol. 288] Q. How did you end the conversation that day?

A. That we would go home and refigure our cost.

Q. Did you go home and refigure your cost?

A. Yes.

Q. Then what did you do?

A. We advised them that there would be no change. We couldn't make any differential.

FRED J. BRÜGGEMEYER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

**Direct examination.**

Trial Examiner Bayly: Give the reporter your name and address, Mr. Witness.

The Witness: Fred J. Bruggemeyer.

Trial Examiner Bayly: What is the middle initial?

The Witness: "J".

Trial Examiner Bayly: What is your address?

The Witness: My business address is 901 West Harrison Street, Chicago, Illinois.

**By Mr. Forkner:**

Q. What type of business are you engaged in?

A. In the wholesale confectionery business.

Q. How long have you been in that business?

A. The business started by my Dad in 1882 and we have been operating it ever since.

Q. How many are there engaged in the business as part owners?

A. My dad and two brothers are part owners in the business.

Q. Are you one of the first jobbers in the City of Chicago?

A. I would say we might be.

Q. Your father?

A. My father was, yes.

Q. Did you write a little history on jobbing in Chicago?

A. My father did, yes.

Q. To what type of customer do you sell?

A. We are selling at the present time to office buildings, cafeterias, industrial factories, and people of that type.

[fol. 289] Q. Now, state whether or not any of these suppliers named on Commission's Exhibit 347-A and B, with whom you did business, offered to accord or make available to you any of the following savings in making a price to you:

First, savings resulting in freight by buying f.o.b. factory.

A. No, that was not offered to us.

Q. Two, savings resulting from elimination of seller's salesmen's cost?

A. No, that was not offered to us.

Q. Three, savings resulting from elimination of 24-count cartons in substitution of 100-count or 60-count cartons, except as you have already detailed herein in the record?

A. No, that was not made available.

Q. Four, savings resulting from elimination of returns for stale or unsalable candy?

A. No, sir.

Q. Five, savings resulting from elimination of free or discount deals?

A. No, sir.

Q. And six, pecuniary advantage of advertising of distribution given?

A. None of those things were offered to us.

Q. Now, in connection with free deals and discount deals, did any of these suppliers offer to give you a discount equivalent to it?

A. No. We had no choice. They had a deal which we either had to take or did not take, one or the other.

Q. Did that cause any difficulty with your business?

A. Yes, because we were forced to buy certain deals to compete with our fellowmen, or vending machines, or whatever you want to call them.

Q. Give a fuller answer on what that caused, if you can, to your business, in connection with deals.

A. Well, they had various deals where they would give a box free with a box, which was passed on to the store.

keeper. We objected very strenuously to the fact, we got paid a profit on one box and we delivered the other box at practically no cost to him and no profit to us.

They had other deals where they gave three or four bars, which were passed on. It was of no benefit to us whatsoever.

[fol. 290] Cross-examination:

By Mr. Gravelle:

Q: Is it your thought, Mr. Bruggemeyer, is it your testimony that these free deals were directly from the manufacturers to the consumer?

A. No.

Q. Didn't they have to go through the jobber's office?

A. That is right, the goods were sold to the jobbers and the jobbers in turn sold them to the customer.

Q. Were you under any legal obligation to pass those savings down to him, or did you do that voluntarily?

A. The manufacturers generally advertised the fact to the retail trade that there was a free deal, and we delivered the goods, we told the girls to deliver the goods with the orders that we might have had.

Trial Examiner Bayly: In other words, you just did the job for nothing?

The Witness: That is all. We just wore out our equipment trucking and dragging the stuff around without any profit.

F. A. Marticchio was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. What is your name and address?

A. F. A. Marticchio, Centralia, Illinois.

Q. Now, Mr. Martiecio, are you the president of Hollywood Brands, Inc.?

A. Yes, sir.

Q. Are you the one who had the negotiations initiating the sales of those candy bars shown on Commission's Exhibits 352-a, -b, -c and -d?

A. Yes, sir.

Q. So that on some of the accounts you allowed them to buy f. o. b. factory at a lower price and others were sold delivered. Part of that difference was also the fact that the [fol. 291] f. o. b. price was without salesmen's commission, is that right?

A. The f. o. b. price factory you are talking about?

Q. Yes.

A. Yes.

Q. Were there any other factors taken into consideration that would make any difference in price?

A. Well, this was a pretty well established price whereby we gave jobbers and retailers free deals, and when we had our detail men working in different states, why, we gave the retail grocer or retail confectioner three bars with a box, or something like that, in order to get placements. That's where the difference comes in in making the lower price to the Canteen and others who would buy on-volume.

Q. Now, when you made these deals offers to jobbers, did you give them a choice of either having a deal or having a discount equivalent to the deal, a reduction in price which was equal to the value of that price in free goods?

A. We couldn't very well do that, Mr. Forkner, because a lot of these jobbers do not buy long count goods. Some of them buy just a very small amount. I don't see how they could handle that much candy in order to give them a price like that. The candy would spoil on their hands and it just wouldn't be feasible.

Q. Well, they didn't have their choice, in any event, whether to take the deal or the discount?

A. That is true.

Q. However, Automatic Canteen and F and W did have that choice of discount between the deals given to the jobbers, is that right?

A. That is right.

Q. Also, did you give the jobbers the opportunity of having a reduction in price if they would dispense with the services of salesmen, thereby eliminating the expense of salesmen?

A. No, sir.

Q. Did you consider the elimination of returns for stale or unsalable candy sold to the Automatic Canteen Company of America?

A. Yes, sir, that was taken into consideration. However, if candy was not made right, which sometimes happened in a factory, why, we took it off from Canteen's hands as well as some of the jobbers. Of course, that happened only in very rare occasions.

[fol. 292] Q. In other words, you gave them a little reduction for the fact that they did not have the privilege of returning stale or unsalable goods?

A. That is right.

Q. And you also gave that to F and W?

A. That is right.

Q. And were there some other customers you gave that to, too?

A. I can't recall at this time.

Q. Now, in that particular case at the same time were you selling them at \$2.33 delivered, you were also selling Automatic Canteen at \$2.12, is that correct?

A. One delivered and the other, this is a salesman's order, Fox, he is the man that put the order in.

Q. I see and he got the commission?

A. He got a commission. That is the delivered price, commission on the Canteen Company is FOB price without a commission.

By Mr. Forkner:

Q. Now, will you tell us about the deals that you had which effected price in 1936 to 1941, in general, just very briefly.

A. Well, that would be a pretty hard thing to do because so many different deals have been, were given to so many.

Q. Well, I am more interested in your deals, that effected price.

A. Either we made a better price, reduced the price, or we gave them a box free with ten or something like that, and then our detail men covered the retail trade. Now, then—

Q. That might have been before 1941?

A. Now that is something I can't recall.

Q. But during that period of time?

A. Between 1937 and 1947 you are talking about, is that right?

Q. I am talking about 1936 to 1941. In other words, up to the beginning of the war.

A. That would be along that line.

Q. Yes. And would a deal like this one, free with ten, would that be offered through the salesmen in the different territories?

A. Yes, sir.

[fol. 293] Q. And would be offered in certain territories?

A. No, sir, offered in all territories.

Q. Did you have premium deals, too?

A. We did have some premium deals, either premium—

Q. Who would they go to, the jobber, retailer, or salesmen?

A. Jobbers, mostly.

Q. How about the one free with ten, would that go to the jobber, the retailer, or consumer?

A. That went to the consumer, no, the jobber.

Q. Do you have—

A. And he in turn reduced the price to the retailer.

Q. How did you control his reducing the price to the retailer?

A. Competition took care of his—

Mr. Howrey: If Your Honor please, I object to that because it has no possible bearing on this case how he controlled a jobber with reference to the handling of his deals.

Mr. Forkner: I admit, Your Honor, it is a bit awkward the way I put the question which was really pertinent. It merely means how did you know the deal was not passed or was not passed on to the retailer?

Trial Examiner Bayly: Objection overruled; let it stand.  
Proceed.

The Witness: We had no way of really telling.

By Mr. Forkner:

Q. Did you have any consumer deals where the consumer got free goods?

A. No, sir.

Q. Did you have any deals with which—which were distinctly for the retailer rather than the jobber?

A. Yes, sir.

Q. And the jobber passed those on to the retailer?

A. Yes, sir.

Q. Can you name some of your outstanding deals?

A. To the retailer we had our detail men out. They gave three bars with a box of, about two boxes I think, they gave them six bars for placement. Those were placement deals.

Q. That was given to the retailer?

A. Given to the retailer.

Q. That was not given to the jobber?

A. The jobber got the goods and then it was taken from the jobber's stock and his free goods.

[fol. 294] Q. Now, you have not produced any records at all for the entire period of 1936 down to the present time in response to a subpoena duces tecum?

A. I asked Mr. Crigler to go through the files and he went through the files as he testified here, and we are willing to send you the files if that is what you want. We will be glad to send them to you.

Mr. Forkner: That is all.

Trial Examiner Bayly: Any cross-examination?

Mr. Howrey: Yes.

Cross-examination.

By Mr. Howrey:

Q. When you granted a deal, your net price or income was reduced to that extent, was it not?

A. Yes, sir.

Mr. Howrey: That is all, Your Honor.

Trial Examiner Bayly: When your company gave these premiums, trinkets and gadgets, did you set up a case value on your books as to what they were worth?

The Witness: I believe we did, yes, sir, but I don't know whether we would have those in the records now or not.

Trial Examiner Bayly: What did you give along that line?

The Witness: When we put out the "Rain" bar we gave the jobber an umbrella.

Trial Examiner Bayly: All right. Now, have you on the books the value of that in dollars and cents?

The Witness: I think we have, I wouldn't be sure, but I think we could check that back.

Mr. Forkner: Just one question.

#### Redirect examination.

By Mr. Forkner:

Q. If the jobber didn't want the umbrella in this case but desired to have a little lower price, equivalent to the value of the umbrella, would you offer that to him?

A. I don't know whether we did or not. I won't be sure. That was the deal and—

Q. You mean it would be a policy on those deals they would have a choice of taking the trinket or umbrella or getting the discount?

A. No, if we gave the deal it would be the same all over. [fol. 295] Q. They would either have to take or leave it?

A. That is right.

Q. Because you were advertising it, I suppose?

A. That is right.

O. G. Trudeau, was therupon called as a witness for the Commission, adversely, and having been first duly sworn, testified as follows:

#### Direct examination.

Trial Examiner Bayly: Give the reporter your full name and address.

The Witness: O. G. Trudeau, 4607 Moreland Avenue, Minneapolis, Minnesota.

By Mr. Forkner:

Q. Mr. Trudeau, you are the president and one of the directors of the Trudeau Candy Company, Inc., located at St. Paul, Minnesota?

A. Yes, sir.

Q. And is the street address of the company 2287 East 26th street?

A. Yes, sir.

Q. And I believe you are a Minnesota corporation organized on August 28, 1939?

A. Yes, sir.

Q. And before 1939 were you operating as Trudeau Candies?

A. No, sir.

Q. Were you in the candy business?

A. Yes, sir.

Q. What was the name of the candy company?

A. I was employed by Mars, Inc., in Chicago.

Q. Then you have been in the candy business for some time?

A. About twenty-five years.

Q. Now, who are the other officers of your corporation?

A. A. M. Trudeau, first vice-president; L. J. Maschka, sales manager; P. J. Pfeilstiweet.

Q. And are these also directors of your company?

[fol. 296] A. No, they are not. There are only two directors at the present time, there were three previously.

Q. Now, in selling your 60 count, to what class of trade did you sell that?

A. That was offered to anyone who would purchase or could use a 60 count package.

Q. Does that include jobbers, too?

A. That included jobbers, chain stores.

Q. Now, how about the 100 count pack that you made up?

A. The same thing was offered to everybody who wanted to buy counts.

Q. Did you bring any material in the form of memoranda, letters or sales quotations, prices or price lists in which you had the 100 count listed?

A. No, I couldn't because it wasn't generally—I don't think we ever sent out what we call "broadsides" on the 100 or the 60 count. We used to send out "broadsides" on the 24 count. That "broadside" sent to everybody on our list not only to customers but prospective customers.

Q. Was that the same list you might use for deals which you might have had before the war, free goods?

A. That is right, we used to use that broadside for announcing our deals.

Q. What type of deal did you have before the war to jobbers?

A. They varied. I think our first deal was a Silex coffee brewer which we offered with a certain number of boxes to the jobbing trade and to the trade in general that would be interested in buying a Silex coffee brewer with some candy.

Q. Could they have a discount instead of having the brewer?

A. When we have a deal they pretty much accept it.

Q. They couldn't have gotten a discount equivalent to it?

A. We never asked that. The intention was to give the brewer with the purchases.

Q. Any discount deals with—where the discount was given?

A. Later, not as a discount. I started to say that we had the Silex brewer; later we had socks. So many pairs of socks were given, so many boxes. I think we had a flashlight lantern which was very popular. Later on we went to what we call a merchandise deal which is instead of a premium giving two boxes free with forty-eight or some such deal where the jobber would benefit for the effort that he put in to obtain distribution on our product. In other words, that is what the deals were intended for.

Q. Were these what you call jobber deals or retail deals?

A. They weren't particularly called deals.

Q. Did they benefit the jobber or the retailer?

A. It is hard to say. I am under the impression that some jobbers passed part of it on, passed it on. Some jobbers took it as a profit for themselves for their effort in getting distribution.

Q. Those were offered to the jobbing trade. I take it?

A. Offered to anybody who would buy them.

- Q. Twenty-four count?  
A. Any one that wanted the premium.  
Q. They would have to buy the 24 count though?  
A. Yes, that is right.

ABRAHAM RAFFEL, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

- Q. Give the Reporter your name and address?  
A. Abraham Raffel, located in business at 1414 South Halsted Street.  
Q. What type of business?  
A. Tobacco company—Reliable Tobacco Company—we sell cigarettes, tobacco, candies,

Q. Now, will you tell me whether any suppliers that you dealt with or did business with offered to accord you or make available to you any of the following savings in making a price to you. First, savings resulting in freight, buying FOB factory.

- A. No.  
Q. Savings that resulted from elimination of salesman's commissions?  
[fol. 298] A. No.  
Q. Savings resulting from elimination of returns, for stale or unsaleable candy?  
A. No.  
Q. Savings resulting from elimination of free deals, if you won't take a deal, give you some less?  
A. No.  
Q. Or did they give you any reduction in price with reference *with reference* to any advertising or distribution given?  
A. No, sir.

WALTER EDWIN SWANSON, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Forkner:

Q. Mr. Swanson, would you give your personal addresses or address to the reporter?

A. 209 East Lake Shore Drive. That is my residence. My office is 2101, 333 North Michigan Avenue. The name is Walter Edwin Swanson.

Q. Mr. Swanson, have you been subpoenaed to appear and testify at this hearing?

A. I have, sir.

Q. And did you in response to that subpoena make a special trip back from Canada from your summer home?

A. I did, day before yesterday.

Q. Now, Mr. Swanson, will you tell me something about your connection with the Automatic Canteen Company of America, as to whether you were one of the founders of, originators of the company?

A. Mr. Frank H. Anderson and myself made a connection in 1927 for the raising of funds for the election of John A. Swanson, States Attorney of Cook County. During that association and after the job was terminated we, because of our friendly association, decided to join hands in some sort of business project. During that period of time we had the pleasure of meeting Nathaniel Leverone; and because we enjoyed his company we three decided to form a partnership in some sort of business venture. In our investigation we, more or less accidentally got in touch with the vending machine business. It appeared attractive. It had been a business or industry that was in rather ill repute for many years. We felt that there was a field there for a legitimate, high class policy that could be developed into a profit making business, and on the first of July, 1929, we were incorporated and—I said incorporated, but it was slightly before that—and we opened our offices on Austin Avenue. That was the beginning of the business.

Q. What year was that?

A. 1929.

Q. What position did you occupy and the other two gentlemen at the beginning, the official positions that you were talking about?

A. I occupied the position of vice-president, Mr. Leverone president of the company, and Mr. Anderson secretary and treasurer.

Q. Now, Mr. Swanson, can you tell us about your policies, the company policies, developing the operating of the mechanical division of the company, stressing, if possible, the aids and helps which you gave to your distributors in developing this business?

A. The general policy of the company was, first, to develop a piece of equipment that — as near foolproof as possible. For many years there had been vending machines that were poorly built, and in many instances when a coin was inserted in that machine it failed to deliver the merchandise. That was, I might say, the general practice. We did develop a machine that in 99 per cent of the cases it delivered merchandise for the coin inserted. The policy was to deliver a piece of merchandise equal in quality and weight to that sold on a retail counter for the same price. As far as the aids and helps to distributors, the operating department assisted the distributor in securing a headquarters, making the lay-out of the headquarters, of his mechanical department, his store room, his office, repair department, paint department, and all other necessary departments. In addition to that we sent men out to assist him in securing locations. We sent men out to teach his servicemen how to service canteens. We developed a standard practice of servicing a canteen so that a canteen would [fol. 300] be serviced in Bangor, Maine the same as it would in *Santiago*, California. We had a fine study program we had worked out so that we could service it as rapidly as possible and as efficiently as possible. We held territorial meetings at strategic points for distributors, for servicemen, for mechanics, for the office force and the sales department of the distributor.

Q. Was that of considerable aid to the distributor?

A. It was a very decided aid to the distributor, quite obviously, for the simple reason that each distributor was doing the job the same as the other fellow was.

Q. Any special charge for that service?

A. There was no charge for those services.

Q. You mentioned something about a standard practice of service.

A. There was a definite standard of practice of installation, teaching the serviceman how to install the canteen, regardless of the type of construction of the wall or type of place where it might be hung; also there was a definite standard of practice of service with photographic displays, as well as typed matter showing him how to service a canteen, how to conduct himself as a person, all the rest.

Q. Was that your particular phase of the business to handle?

A. I handled all of that end of the business. I wrote the standard practice of service, likewise the standard practice of installation.

Q. Will you explain what each of those are?

A. I don't believe I have the question clear in my mind.

Q. You mentioned a standard practice—

Trial Examiner Bayly: Well, he has already mentioned the different things. You mean in addition to what he has already mentioned? He said he did lay out which he prepared and gave to all of them. Do you mean in addition to that?

By Mr. Forkner:

Q. I show you what has been marked as proposed Commission's Exhibit 305 and ask you if that is the standard practice manual which you are referring to in your testimony.

A. That is the standard practice of service which I wrote. I made a time study and personally took all the photographs in that book.

[fol. 301] Trial Examiner Bayly: While you were an officer of this company?

The Witness: While I was an officer of the company, yes, sir.

By Mr. Forkner:

Q. Now, using this for the purpose of refreshing your recollection, please look at this and tell us the different things 'covered' in your standard of practice.

Trial Examiner Bayly: Now, Mr. Forkner, Mr. Swanson was the author of this, the creator, while employed by the respondent, and sent that out. You might ask him briefly, but we won't spend too much time on it.

Q. By Mr. Forkner:

Q. Just briefly tell us.

A. This standard practice of service incorporated a procedure of employment, financial responsibility, responsibility for merchandise and money that the serviceman handled, responsibility for uniform, tools and equipment, personal appearance, condition of his automobile, procedure at headquarters, upon arrival in the morning, tools, parts and equipment that he should carry in his automobile or truck, his telephone report requirements, his dealing with customers, his dealing with clients, procedure at headquarters upon return at night, the handling of merchandise and the standard practice of service, of which in the standard practice of service there were 57 so-called movements or operations.

Q. Why was that important to develop that method of instruction to help the distributor in his business?

A. Unless there had been a standard of practice, an operation having two or more servicemen, each would have been servicing canteens according to his own ideas. We insisted that every canteen be serviced in the same identical fashion, one as the other.

Q. Would that standard of practice extend to uniforms and method by which the distributor treated the customers of his?

A. Very definitely. Very definitely.

Q. Would that also extend to a policy as to quality and weight of bars, candy bars, gum and peanuts, the so-called market?

A. The serviceman and distributor had nothing to do with the selection of merchandise, none whatsoever. We originally selected the merchandise, frequently submitted

[fol. 392] it to the distributor for what might be termed his secondary selection.

Q. Was this a developed science in this business or was this a new business in which the science of operation had been developed?

A. There was no science nor was there any plan, procedure, available in the Department of Commerce as you might be able to get in opening a drug store or grocery store or many other businesses. There was no plan. We had to develop the plan. I think that largely accounts for the success of the business, because it was organized along good business practice.

Q. State whether or not there is any method developed or any precedence which you could follow in, we will say, 1836 on down.

Trial Examiner Bayly: He has just about covered that, hasn't he, Mr. Forkner? He said this was more or less a creative work, there was no standard, norms, for this type, and he more or less evolved this for his company. If there is anything in addition to what he has testified you might develop it, but I think he has covered that.

Mr. Gravelle: As I understand it, your Honor, Mr. Swanson takes the position that the success of the Automatic Canteen Company was due to their efficiency.

By Mr. Forkner:

Q. Now, what did you do in securing additional or new distributors? Will you explain that a little bit, from your point-of view, and as the head of that particular operating department of the company?

A. Originally we advertised in a coin journal and other similar trade papers for distributors, and we also went into a community and placed ads in newspapers to attract prospects' attention. We explained the business, we qualified him from the standpoint of his ability and his education and his financial responsibility; and then decided upon a given territory which in most instances we insisted that he be familiar with.

Q. I suppose you pointed out the advantages of having a national organization which would aid and assist him in operating this business?

A. Very decidedly, bearing in mind at the early stages of the game it was by trial and error. We had no plan and no procedure, and we did more or less grow up like Topsy. [fol. 303]. Q. Now, will you state as a matter of fact from your background and experience that this procedure did aid and assist the distributor in promoting his business and that also of Automatic indirectly?

A. There isn't any question about it, because, well, when I retired from the business in August 1944 we had some 137 so-called operations, either owned directly or indirectly or managed by a so-called distributor management. If and unless we had a standard of practice we would have had 137 different ways of doing business, whereas, because we had this standard of practice, those distributors operated as a unit, altogether, the same way, as near as it was possible to get two human beings to do it the same way.

Q. Now, did you have particular charge of sending out bulletins, letters and pamphlets to these distributors suggesting ways and means of improving and aiding their own business and indirectly that of Canteen?

A. I wrote and sent out many hundreds of bulletins over a period of 15 years, 1929 to 1944, addressed to distributors and the servicemen, showing them how to proceed more efficiently, and it was through getting reports across the country we served as a melting pot, and out of that developed these experiences that were most efficient.

Q. Now I show you proposed Commission's Exhibit marked for identification 367 and ask you if that is a group of bulletins for the year 1938 and sent out.

Mr. Howrey: Are you skipping 366?

Mr. Forkner: Yes.

The Witness: The bulletins in this particular folder were written by Mr. Anderson, Mr. Boyd, who came as my assistant, Mr. Folsom, one of our employees, by Mr. Richmond, who joined us some years ago and was elected one of our vice-presidents, and a number of other department heads. I would say that over a period of 15 years I wrote or supervised the writing or reviewed all of the operating department bulletins. Q.Q

By Mr. Forkner:

Q. About how many would you estimate that to be?

A. That is pretty hard to say. Possibly there were one or two bulletins a week or less.

Q. During some years did you have as many as approximately twice as many as in that particular exhibit, proposed Commission's Exhibit 367?

[fol. 304] A. That would be hard to say without counting the bulletins.

Q. Now, did that aid and assist the distributor in operating his business?

A. Very decidedly.

Q. Was that absolutely necessary from 1936 on down, we will say, to 1941 in developing a distributor in the vending machine business?

A. I would say it was just as important in 1944 as it was in 1929, because there were new developments continuously, every phase of the business.

Q. Now, can you explain that about new developments? Is that anything more unusual than any other type of business?

A. No.

Q. Now, you had some other divisions of the company, did you not, that aided and assisted the distributor?

A. Very decidedly. Our sales department assisted in securing locations.

Q. Now, will you tell me what they did to help the distributor?

A. In securing locations.

Q. Well, how did they proceed and what contacts did they make and how big was that department?

A. At national headquarters that department had from two to a half dozen men that went into the field, visited a distributor and assisted him in securing the locations; the same as a general sales management would go into a territory and assist the local salesmen in closing accounts, no difference at all.

Q. Was that substantial and material aid?

A. Very definite aid.

Q. Now, will you tell us about some of the other divisions of the company that aided and assisted the distributor?

You mentioned the operating division of which you had the principal responsibility. You mentioned the sales division. Now, as I understand it, you had some other divisions also.

A. We had a financial department which assisted the distributor in setting up a standard of practice and his books, his bookkeeping system, his accounting system.

Q. Did they assist a man out in the field on that?

A. That is the distributor that I was speaking about. We had a traffic department.

Q. Tell us about the traffic department.

[fol. 305] A. The traffic department was in the charge of Art Schaeft, who had considerable experience in railroading and traffic work. His job was to find the best ways and means of shipping merchandise, size, weight, tensile strength of cartons, and other similar phases of traffic work.

Q. Did that benefit the distributor in operating his business?

A. Decidedly.

Q. Now, what other divisions did you have?

A. We had a mechanical department which assisted the distributor in repairing canteens, refinishing canteens, furnishing the distributor with parts that were worn out or which became broken.

Q. Would that mechanical department be the same department that designed and built up and secured machines for rental to the distributor?

A. And developed equipment likewise, yes.

Q. Did you have anything to do with that?

A. I had everything to do with it up to the time Mr. Richmond was brought into the organization, and we put him in complete charge of the development and handling of the mechanical end of the business under my supervision.

Q. Will you explain what part that played in the development of the distributors' business?

A. It played a very important part for the reason that we were trying to keep ahead of the other fellow, our competitor, in developing better and more attractive equipment, just the same as General Motors develop or attempt to develop a new automobile every year.

Q. Now, what did you do in securing the right type of machine for rental to a distributor?

A. We had to develop a new type of machine based upon our experience with the old one. There was no pattern.

Q. You didn't manufacture this machine, did you?

A. It was manufactured under our specifications by various manufacturers.

Q. Now, did you also repair these machines for these distributors?

A. We did in certain territories. In Chicago we had what might be termed a national repair shop, but it was largely for this particular area. We insisted that the distributor set up his own repair department, because it saved them money.

Q. Were your distributors trained to make minor repairs on these machines?

[fol. 306] A. To make major repairs. They were equipped to practically rebuild any one of our pieces of equipment.

Q. Trained by the company here?

A. Trained by the company, yes. We sent them out in the field to train them.

Q. Now, did you aid or assist the distributor in giving him, or his machine to him at what you might call a nominal rental basis?

A. Our original policy, which we lived up to throughout my history with the business, was to furnish him a piece of equipment and charge him a rental which did nothing more than amortize the cost of that rental over a period of years.

Q. What period of years did you figure there, since 1936?

A. In most instances that would depend upon the Treasurer of the Internal Revenue program.

Trial Examiner Bayly: You mean, Mr. Swanson, you charged a rental fee which was designed to amortize the cost of the machine?

The Witness: Correct, with no attempt to make a profit from rental.

By Mr. Forkner:

Q. Where was the profit made from?

A. From the sale of merchandise.

Q. Well, in connection with the designing or the furnishing of any machines and the repair of such machines, was

the development of any machines as a mechanical matter an ever changing picture, in other words, the machines became obsolete very quickly during that period of time?"

A. Well, it depends upon how you term or define "quickly". When I retired from the company in 1944 we had equipment that we had had for ten or twelve years, because there had been no rapid moving of parts. For that same reason the equipment would last practically indefinitely except for obsolescence. The obsolescence feature was not particularly disturbing for the first ten years of the business for the reason that there were no manufacturers who manufactured a piece of equipment comparable to ours, and in later years, I think it was possibly 1941 or 1942, we engaged the services of Raymond Loewy, the very famous mechanical designer in New York, on a retainer basis to develop the styling, the design of new equipment which we contemplated then.

[fol. 307] Q. Did that help and aid the distributor?

A. Very decidedly, for the simple reason that it assisted him in coping with competition.

Q. In your opinion and judgment, based upon your background, would you say that you were able to keep ahead of the game as far as mechanical equipment was concerned during that period of time?

A. I think my statement would be honest in saying yes. We at least tried to.

Q. How would you place the importance of each division of your company in relation to its importance in aiding and assisting the distributor to operate?

A. You mean the importance of various departments in the order of their standing of importance?

Q. Yes, or recognizing, however, that all were essential.

A. I would answer it that way. I might be a little bit selfish in stating possibly the operating department was a little bit more important.

Q. Well, who would start thereafter?

A. I think it was of equal importance, to be fair to all departments. It is hard to say which was the most important.

Q. What part did the product division have in aiding the distributor?

A. Ralph Boyd was in charge of the product department, under the supervision of Mr. Anderson. Mr. Boyd contacted various candy manufacturers and selected types of merchandise we felt had a definite sales appeal for our customers. There was a big variety of candy bars and yet they can be classified into very few classifications, solid chocolate bars and chewy bars and soft bars and nut bars, some chocolate coated; coated with other materials.

Q. Then you had to consider the demand of a particular bar and consider, perhaps, the locality in which that demand might exist?

A. Exactly, or develop a demand.

Q. Did you also have to check on shape as well as the wrapping on the bar to see that the bar would move with alacrity down its channel to the consumer when he put his nickel in the machine?

A. Very frequently we suggested to the manufacturer to change the shape, size or wrapper to make it more attractive, to put more nuts in or more chocolate or more vanilla or something else, but in all instances we insisted that that bar be of the same quality and weight as that sold on the retail counter.

Q. Now, as to that policy of your company, you just mentioned you buy candy at a grade and quality. State whether or not that policy was carried out during the time that you were there from 1936, which is the period we are interested in, to 1944 when you left the company.

A. Very religiously.

Now, Miss Reporter, read that question to him.

(The reporter read the question as follows:

"Question: Now, I think we have discussed, or you have answered on the type of product; its shape and its wrapping, and also the fact that it should be of equal quality and weight. Now will you tell me what policy you developed in respect to securing the right price on these products?"

Trial Examiner Bayly: Now, I think we have taken care of the Anderson question once again and, I hope, the final

time? Any conversations that you had, Mr. Swanson, with other officials of your company having to do with the question of evolving any policy such as price, terms and conditions to get merchandise to vend through these channels you set up is the object of this question as I understand it, and the objection is overruled. You may answer. Proceed.

The Witness: After a certain bar had been selected because of its quality, weight and attractiveness, obviously the next question was price. We presented the manufacturer very definitely with the fact that we did not require a 24 count display carton, which was a costly carton. We would prefer having the merchandise packed in a 100 count corrugated carton, unprinted. We also pointed out to him that he would not need the typical sales expense in handling our business, because once a bar or several bars had been selected; it was more or less of an automatic and continued arrangement whereby our order went to him and he shipped directly to the distributor. In other words, there was no necessity for his sales department to contact us at any time.

[fol. 309] By Mr. Forkner:

Q. And that eliminated the salesmen's commission?

A. Exactly, because we insisted that it be a house account and we had no reason for dealing with a salesman, so to speak. We also showed him that in doing business with us he eliminated the bad debt situation, collection expense, advertising expense in a local territory, savings in returned goods.

Q. What was that?

A. It is a common practice in the candy business that when a salesman for a candy company or a jobber sells a retailer that when he has merchandise that doesn't stand up it will be returned to the manufacturer. When I say stand up I mean because of weather or other similar conditions. We had none of that. I don't believe in the 15 years I was associated with the company we ever returned any merchandise to any manufacturer.

Q. And that was pointed out to the manufacturer?

A. Very definitely. Those were decided savings that we insisted be passed on to us.

Q. I think you mentioned the elimination of sales cost,

the elimination of 24 count cartons, elimination of returns allowances. Was anything covered or stated to these suppliers in reference to free supplies, free deals?

A. We definitely had no free deals of any sort, any free goods, and that, as I understand, was the standard practice in the candy business, because you bought two 24 count boxes of this and you got so many free bars or a handful of balloons or toys or some other similar merchandise that was used as a lead.

Q. Then in that case would you ask for a lower price equivalent to that particular free goods or free deals, premium?

A. We asked about it and thought we were entitled to those savings, yes, of course. We tried to pare down the costs as much as we could.

Q. Why was that necessary?

A. Why was that necessary?

Q. To pare down the costs?

A. It was just as important to us to pare down the costs as it is to General Motors when they go to U. S. Steel to buy a carload of steel.

Q. Now, was anything said as a matter of policy to these suppliers in respect to buying on a delivered or an f. o. b. price?

[fol. 310] A. Oh, there were many different arrangements. It depended upon location, largely, of the manufacturer, and whether it was f. o. b. or point of destination didn't make any difference, a particle of difference, because it had to come out of the whole cloth after all.

Q. I show you, Mr. Swanson, Commission's Exhibit 82, which is a letter dated November 15, 1939, addressed to Otto Schnering of the Curtis Candy Company. I show you Commission's Exhibit 17-f, -g and -h which is a letter dated November 13, 1939 addressed to Otto Schnering of the Curtis Candy Company, and I show you Commission's Exhibit 102, 103 and 104 which is a letter dated February 15, 1937 which is addressed to Mr. James Gleason, sales manager of W. Schrafft Sons Corporation. Now, in each of these letters these different factors which you mentioned in

your testimony are covered, or we will assume they are, but in addition thereto as you will note, there are certain percentages set up for each of a particular saving. Now, my question is, after you have examined these exhibits as to whether or not those letters represented the company policy in respect to approaching suppliers during the period of 1936 on down until you left the company in 1944.

Trial Examiner Bayly: Go ahead.

The Witness: I would say as a policy that we use percentages or we used actual figures in presenting these proposed savings to the manufacturer which we suggested and recommended be passed on to us. Why should we pay for things that we didn't get or didn't use?

By Mr. Forkner:

Q. Now, those savings that you mentioned as a policy and which are mentioned in these three exhibits here referred to are savings from a price given to other customers by the suppliers on their 24 count carton which generally sold for or sold to the jobbers, isn't that correct?

A. Yes.

Q. In other words, it was a subtraction from a base price given to others?

A. No question about it, no question about it any more than if I shipped a carload of merchandise from California [fol. 311] to Chicago which didn't require refrigeration, certainly I am not paying refrigeration charges or if I buy a suit of clothes and eliminate the vest I am certainly entitled to the reduction of the cost of the vest.

Q. Now, how did your company determine what these savings were, or percentages that you should have to merit a lower price? How did you determine those percentages? Did they come from any—

A. I don't think there is any mystery... I can't see any mystery. I wasn't hesitating to—evading your question.

I don't see there is any mystery in determining that savings are obvious in the elimination of the 24 count carton.

Q. I am referring now to the percentage for that purpose. In other words,—

A. How did we determine the cost of a 24 count carton?

Q. As against 100 count.

A. I can call up any printer or a box manufacturer. There is no trick in that. I certainly can get a breakdown in any candy company that I am doing business with that it costs him to sell his goods.

Q. Did they come from any of the companies or any of your suppliers?

A. I think probably they did. I wouldn't know at this time, I don't know that I ever investigated that end of it.

Q. Now, in your association with these various companies and in view of your background, would you say that the manufacturer was thoroughly familiar with all the savings he would expect from the manufacture and distribution viewpoints, do you know?

Mr. Howrey: If Your Honor please, I object to the question because I don't understand it. Do you mean candy manufacturers?

My. Forkner: Yes.

Trial Examiner Bayly: This is an intelligent witness. Let's see if he understands it.

The Witness: I understand the question. If I may be slightly factitious, I question whether the average candy manufacturer has the intelligence to know his breakdown of cost, and when I say breakdown, I mean to get into the infinitesimal points, his definite unit costs. If he makes a batch of candy he knows what he puts into it, he knows [fol. 312] the primary cost, but I don't think he knows his definite unit cost, applied to all costs that should be applied to that particular unit. I don't think the average candy manufacturer is in position to hire or put into his organization an efficient cost accounting system that would give those costs as might be broken down and as is broken down by General Motors or the Stevens Hotel or the Palmer House, who have a very high-grade cost system. Does that answer your question?

Q. Yes, I think it does. In other words, a given manufacturer in making a price on certain kinds of candy and a certain amount would have to do a certain amount of guessing as far as actual—

A. In a measure for this simple reason, without discounting his ability. For the simple reason he makes up a candy bar and until his volume reaches a point where it is feasible and practical and — economical piece of merchandise, he doesn't know what his costs are. How can he? He knows what his prime cost is, but it is all based on volume as to what his final cost is.

Q. In other words, he doesn't know until he has finished the making and selling of that batch and perhaps other batches of candy that he knows whether or not —

A. And a reasonable amount of experience.

Q. Isn't that true especially on the cost of distribution which is more elusive than the manufacturing costs?

A. I think that probably is true.

Q. Doesn't the volume of production have a great deal to do with the labor cost?

A. Has everything in the world to do with it.

Q. Approximate cost?

A. No question about it, whether it is manually packed or mechanically packed. Meaning that —

Q. Isn't it a fact that in the manufacture of candy, from your experience and background, the manufacturer of candy is unable to project his costs because they are unable to determine the volume and other things?

A. I think that it is reasonable to assume that.

Q. Now,—

A. The same as in any other manufacturer with any other product who hadn't had the experience with that item.

Q. This is a question which follows from what you have just stated here in the last two or three answers. Now, [fol. 313] then, could your company determine as a matter of policy the precise percentage that the candy should be reduced to in selling to your company as is apparently done in these exhibits I have just shown you, Commission Exhibits 17, 82, and 106-a-f-g, in the Gleason matter?

Mr. Howrey: I object to the question because it isn't warranted by the exhibits. He speaks of precise percentages, and I think if the witness is given an opportunity to read the exhibits before he answers the question; I think it only fair to him because the exhibits do not support the language of the question.

Trial Examiner Bayly: Read the question and answer—just the question, there was no answer.

(The reporter read the question as follows:

"Q. This is a question which follows from what you have just stated here in the last two or three answers. How, then, could your company determine as a matter of policy the precise percentage that the candy should be reduced to in selling to your company as is apparently done in these exhibits I have just shown you, Commission's Exhibits 17, 82, and 106-e,f,g, in the Gleason matter?"

Trial Examiner Bayly: Witness has testified based on his experience and operations that the average manufacturer supplier until he gets production up and for other reasons probably does not know the exact items which go to make up his composite costs and therefore would not be in a position at any given time to evaluate these items used by the respondent in buying due to savings. This question, in the light of that information and other testimony and exhibits, is designed, if I understand it, is to elicit the information as to how the respondent would know whether or not these discounts sought and received were the same as the savings represented in the buying; as I understand it, that is the question, and if that is correct, my objection is overruled and the witness may answer.

The Witness: In the case of the letter written by Frank Anderson, and I am trying to be fair to Frank Anderson—

Trial Examiner Bayly: Men ought to be fair. Fairness in society is the same as harmony in music. You always want to be fair and you always want to be just.

The Witness: —written February 15, 1937, we had had eight years of experience in the business at that time, and if I may quote him: "To summarize on the actual economic [fol. 314] savings of elements of cost in our dealings, we are advised that the following figures are typical—". We

don't say anything about them being precise or exact, they are "typical." When we presented these savings as we saw them to be savings to many candy manufacturers we asked them for a breakdown of their costs and insisted upon it. Over an eight-year haul from 1929 to 1937, I haven't any doubt, I can't be specific about it, I haven't any doubt we had many candy bar breakdowns from many manufacturers, and if we said that freight represented from five to seven percent that was typical as Mr. Anderson states here. In this letter to Otto Sneering on November 13, 1939, we had then been in business for 10 years, "to summarize on the actual economic savings or elements of cost in our dealings, we believe that the following figures are representative—". We don't say anything about them being exact at all.

Q. In other words,—

A. In other words, how could we tell this manufacturer that the elimination of free deals and samples is eight percent on his candy bar? We don't know what his free deals are, but this is representative of the savings over a long haul.

Q. But in this particular case, as you no doubt know, the Curtiss Candy Company had far more deals in 1939 with most other candy companies, so that there would be a different percentage than that of other companies.

A. I can't answer that question because I don't know, I don't remember.

Q. In other words, these amounts are percentage savings that your company asked for, was the amount that your company thought the manufacturer could give you or would give you when you were compared with what other manufacturers give you?

A. Yes; yes, I would say so.

Q. Yes—

A. I would say they were general average percentages or in penny savings or in mills.

Q. Yes.

A. Does that answer your question?

Q. Yes, I think you mentioned in your testimony that you did have a definite cost in purchasing merchandise that you tried to adhere to?

Mr. Howrey: If Your Honor please, I object to the question. [fol. 315] We have no testimony along that line that I can recall from this witness.

Trial Examiner Bayly: I do not believe he has quite finished the question.

Mr. Forkner: I don't think I have quite finished the question.

Mr. Howrey: I am sorry, you stopped and—

By Mr. Forkner:

Q. State whether or not in view of your operations and services that you performed for your distributors it was necessary for you to, as a company, secure a price within a certain range. In other words, to resell to your distributors and still operate, etc.

A. If I may answer that in a round about way, in the food business the Palmer House may insist upon a 45 percent food cost to be able to operate their restaurants profitably. After trial and error and years of experience we have arrived at a very definite so-called food cost or merchandise cost that we could afford to pay. If the manufacturer could not sell us at a price that we could afford to buy, we didn't buy. If he couldn't afford or didn't wish to give us the benefit of these savings, we didn't buy it. We didn't force him to sell. We may have wanted his merchandise, but he couldn't make a price that we could afford to sell it for, it was just no business, that was all.

Q. In other words, you found it necessary to secure merchandise, namely candy, gum, and peanuts, at a certain minimum price range depending on the product and—

A. Identically the same as any other business in the world.

Q. Now, what was that price range in speaking of candy that you had to secure?

A. I don't know. In the first place, that was under Mr. Anderson's charge and rarely did I have anything to do with price in any specific instance, whereas in the selection of merchandise, why, I was always consulted.

Q. Now, were there certain bars on the market that had national acceptance that it was not possible for you to reach in your buying program?

A. That did have a national acceptance?

Q. Yes.

[fol. 316] A. You mean we were not able to because of the high price? Oh, definitely.

Q. Can you name one type of bar?

A. I can name one bar or a series of bars, bars manufactured by the Mars Candy Company. The price was way out of our reach entirely.

Q. Did you try to get a lower price from Mars?

A. We presented the same situation to Mars that we presented to any other company. Their price was still too high.

Q. Yes. Now, in such a case as that, you just mentioned in the case of Mars, what if anything did you do to remedy the situation in order to give your distributors comparable bars?

A. We went out into the field with an attempt to find a bar that was comparable, and if there were no comparable bars on the market we frequently suggested to a certain manufacturer could he duplicate that bar, which in many instances is what was done, and that is being done every day in the business. A manufacturer brings out a new bar and his next door neighbor, Jimmy Jones, tries to copy it. There is nothing new in the candy business after all.

Q. Now, in the case of Mars, for instance, did your company make any attempt to secure a substitute bar?

A. I can tell you of one specific instance. Mars made what was known as their Almond Slice which was a very delightful bar. I asked Harry Martin of the Queen Anne at Hammond if he could duplicate it, which he did. We couldn't tell the difference in the two bars. We designed a very beautiful wrapper for it and we put it in the field. It did a nice job for about a year and then went the way of all flesh because it was not an advertised item and that was all there was to it.

Q. In talking to Harry Martin of Queen Anne, in respect to that bar, I suppose you revealed to him you wanted a bar similar to the bar offered at Mars?

A. Very definitely.

Q. And also indicated a price that you would have to buy on that bar when he made it up?

A. If he could make it for that price and be thought he could.

Q. What was that price?

A. I haven't the slightest idea.

[fol. 317] Q. What was the name?

A. Aristocrat.

Q. Now,—

A. I followed that bar, followed through on it myself.

The Witness: Obviously in determining our costs we took a hundred bars if at that time we were using a variety of a hundred,—frequently it was 125 or more or less,—we took the average cost of those to determine what our costs were, for the simple reason that if we bought a hundred bar at a dollar and a half and another bar at two dollars and a half, if all of our bars were sold at two dollars and a half and—rather, the two and a half dollar pri e bar was sold in the majority, our average would go up. So it was our objective to maintain some sort of an equilibrium in pri e. Does that answer your question?

By Mr. Forkner:

Q. Yes, I think it does. Now, I think you mentioned something about some of the manufacturers that you talked with explained their costs of production and distribution to you during some of this period of time; that is, some of them did.

A. In many instances.

Q. Now, can you explain to me why that was done?

Mr. Howrey: I object, your Honor, unless it is shown that it is a conversation between Mr. Swanson and some manufacturer. If it was with Mr. Anderson, it would not be admissible. So until it is shown that the conversation took place between these two gentlemen I think we should object.

Trial Examiner Bayly: We possibly have to have some beginning point and I assume that after the witness proceeds, in due course the time and the place and the party will be identified. Objection overruled. Proceed.

The Witness: I question that I could be specific in any one instance, but I know there were many instances where

we asked the manufacturer for his costs and I know there were many instances where the manufacturer volunteered to show us his costs to first arrive at the savings that we had presented to him and, second, in some instances and possibly many instances where he could prove up that he could not sell it at a price that we could afford to pay and so we simply had to turn down that particular piece of merchandise; that is all there was to it.

[fol. 318] By Mr. Forkner:

Q. Now, in some of those instances in which the manufacturer showed you his costs state whether or not some of those manufacturers showed you those costs to demonstrate to you that they could not come down to the price that you suggested to them?

A. That is just what I said exactly. There is no question about it.

Q. And there is no question, is there, Mr. Swanson, that in certain instances in talking to a supplier it was your company's policy to suggest a price or a price range within which you could come and buy their products; or, putting it in the alternative, in which your company or its officials would suggest to them that other companies were selling them at such and such a figure, which figure might be lower than they were selling to others?

A. I do not recall that at any time we made a comparison of price paid by other companies, but I know that in a great many instances we told the manufacturer that we could afford to pay X price and that was all. The same applied to equipment. We could not afford to build a stainless steel canteen for the simple reason that a cold sheet steel machine was adequate.

Q. Well, now, at the time that you might have suggested an X price to the manufacturer, there is no question but what you knew or your official knew what the price was that the candy was being sold at on the market in the '24 count, is there?

A. Of course we did. Anybody in the business would know what it was sold for.

Q. But on the 24 count before the war state whether or not you or the officials were familiar with the price of the candy being around 64 cents?

A. Oh, sure, that was a public record. There wasn't anything confidential about that price.

Q. In making a suggested price to a supplier state whether you knew all the costs of that supplier in that particular instance?

A. Not necessarily, unless he presented his costs. We had a general idea of costs, obviously. We knew what chocolate was a pound, and if he used X ounces or X fractions of ounces of chocolate, why, you could easily determine [fol. 319] the price; also sugar and butter and eggs and nougat and all the rest that goes with it.

Q. In those cases where you indicated to the manufacturer the price at which you would buy or could buy those products, were there not many of those instances in which the manufacturer had not told you his costs of production or distribution?

A. In many instances, of course, or where he refused to show us his cost sheets.

Q. So that your suggested price which you made to him as to what you could pay was done in, should I put it, either partial or total disregard of his cost of manufacturing or delivery? That is putting it rather bluntly, but that is what I am getting at, since you did not know his costs.

In other words, you were looking at it from a point of view of your own cost of doing business, of buying and selling candy to your distributors.

A. It is obvious that we had a price, a maximum price that we could afford to buy at and still render the service that we were rendering to our distributors and still come out with a whole cloth, with some profit to our stockholders, or else we would have been out of business.

Q. And was that average price which you mentioned in many instances suggested or told to the supplier in talking to him?

A. Not necessarily. Not necessarily by any means, no.

Q. In many instances was it suggested to him?

A. Possibly so. As I said before, we determined an average price in our own minds through our figures and

we knew that we could not sell,—when we were selling a million bars a day we could not sell 999,000 of an extremely high-priced bar and still stay in business. We had to sell a reasonable amount of lower priced bars and intermediate priced bars, with the high-priced, to strike a profit-making average, if that is clear to you.

\* \* \* \* \*

Q. Their officials would know, would they not, or the company would know, through its officials, that that particular bar in the 24 count was sold for 64 cents before the war?

A. Yes, that was the price.

Q. And they would know that same thing as to, we will say, the Curtiss Candy Company or the Paul E. Beich Company [fol. 320], the Euclid Company, and so forth; they would know that, would they on the nationally advertised?

A. You mean we would?

Q. I mean the company.

A. The Automatic Canteen Company?

Q. Yes.

A. Yes, of course we would. We would know the price that it was sold to the jobber for but those same firms may have sold the vending machine companies and we did not know what the price was, no idea.

\* \* \* \* \*

Q. In other words, in order that you explain the difference in the method in which you operated or wanted to operate and in which you did operate, namely, that you wanted a bar of a hundred count and you wanted it f. o. b. and you wanted it without a salesman's commission, you must have known or your officials must have known in their policy-making powers and prerogatives that others were buying differently and buying on a delivered price and buying with a salesman's cost; that is my point.

A. Of course we knew that. We have covered that a dozen times, that we knew who sold to this jobber for 64 cents or 20 cents or 36 cents or any other given price.

Q. And that that was a delivered price?

A. That is correct.

Q. And that that included a salesman's calling and what it cost that company?

A. Of course, and free deals and all the rest.

Q. And free deals and 24 count?

A. That is right.

Q. And with the right to return stale and unsalable goods?

A. That is right.

Q. That is right. That is what I thought you said.

A. And we simply wanted to take all of these savings and pointed it out.

Q. You had to know what the savings were and what you were comparing with in order to talk to him.

A. That is right. That wasn't any secret. You can go out and find the jobber's price any rainy afternoon.

Q. Did you also know that the jobbers or other customers of these suppliers were not given the privilege of choosing whether they were able to take advantage of similar savings, such as elimination of deals?

[fol. 321] Mr. Gravelle: Your Honor, I object to that question. Mr. Swanson could not possibly know what every other customer in the United States was getting in the way of price and deals, and so forth.

Trial Examiner Bayly: Well, that question may be objectionable as to form and phraseology. As I understand it, did you, Mr. Swanson, know or did any of your associates or executives in conversation say anything to you disclosing to you that they knew that these suppliers were not offering the same type merchandise to others with the same conditions as that offered to Automatic?

The Witness: I don't know that we knew of one single customer that took advantage of these savings or was given the advantage of these savings. How would we know who George Schutter's customers were or Bunte's, or Otto Schmeling or anyone else? They certainly would not give us their customers' list it is obvious. And as far as our own competitors are concerned, we ignored them and I personally established that policy of ignoring our competitors because my given amount of time devoted to concentrating on their business we were taking away from our own business.

Mr. Forkner: That is not the question, your Honor.

Trial Examiner Bayly: You, and by that I mean the Automatic Canteen Company, the respondent, was concerned solely on buying your merchandise within the price range that you thought you could shoot through your distributors and make a profit, irrespective of what the other fellow was buying for, is that correct?

The Witness: Absolutely correct, paying attention to our own business and trying to do a good job.

\* \* \* \* \*

A. I remember very distinctly the first interview with Mr. Gleason in Boston of the Schrafft Candy Company, in which I do not remember discussing that question of price particularly, a specific price or what we could afford to pay.

\* \* \* \* \*

Q. In such a case as that, where a company had a consumer acceptance for their products, you would spend more time in arriving at a right price with the right type of merchandise than you would with one who did not have it? [fol. 322] A. That is correct.

Q. And there is one that you did?

A. That is correct.

Q. Now, you mentioned the words "wrangled" with them for a period of time. State whether or not you were including in that negotiations in regard to price as well as other matters?

A. Obviously price had a bearing on it, sure. I just got through saying that. As far as a specific price, why, I have no recollection of that at all. It is too long ago.

\* \* \* \* \*

By Mr. Forkner:

Q. Now, what part did Ralph Boyd play in your organization?

A. He was our purchasing agent of product; our product purchasing agent.

Q. Now, did Mr. Boyd carry out the policy of your company as you have enumerated it here, while you were with the company?

A. He did and if he had not he would not have stayed there. He was with us for a great many years.

Q. Now, was the business of the Automatic Canteen Company of America attractive enough in the years 1936 to 1941 or before the war for the supplier to make various attempts to reach a price at which you would be willing to purchase their products? That is a general question.

Mr. Howrey: Your Honor, I object as calling for this witness' knowledge of what hundred suppliers had in their mind. I don't believe he claims to be qualified on that.

Mr. Forkner: No, it is not based on that. It is asking him to state in general with their numerous outlets, their advertising value and all that during that period, the competitive area was of such an attractiveness to companies in general that they wanted to sell to him and I think the witness can answer the question without any difficulty.

A. Well, I—

Trial Examiner Bayly: Can you answer that, Mr. Swanson?

The Witness: I think the volume of business and our growth during those years indicated very clearly that the manufacturer was interested in selling us merchandise and if I may say it, if I were a manufacturer I certainly would have wanted to do business with Automatic Canteen Company because of its unusual distribution, which I would have had no opportunity of getting through any other method.

By Mr. Forkner:

Q. Tell me what you mean by that "unusual distribution".

A. Well, now, it is very obvious if we had 1500 canteens in the Chrysler organization, there wasn't a Chinaman's chance of that manufacturer selling merchandise inside that plant except through Canteen because we had an exclusive arrangement with Chrysler, so he had to. With a thousand or ten or twenty thousand employees, where there was no competition, and a canteen hanging on the wall in this particular room, lathe hands or machine men or whatever

they were, that was obviously attractive to the manufacturer.

Q. State whether or not many times you pointed out or the officials of your company pointed out the value of that advertising distribution?

A. Of course we did. Time and time and time and again we pointed it out.

Q. As a means also of securing a better price did you point that out?

A. That was one of—It might be part of it, one of our savings. As a matter of fact, in the early days the manufacturers came to us with an idea of putting ads on the sides of our canteens, their ads. We gave that some consideration and then wound up with the thought that it was a billboard and decided against it.

#### Cross-examination.

By Mr. Howrey:

Q. Mr. Swanson, when you stated that you and practically everyone else knew the jobber's price between 1936 and 1941 you had reference, did you not, to the list price and not the net price of the various manufacturers after the deals and premiums and other free goods had been deducted?

A. That is correct.

Q. That had reference to the published list price?

A. That is right.

[fol. 324] Redirect examination.

By Mr. Forkner:

Q. There is one question I want to ask you. I think Mr. Howrey asked you whether you had in mind when you said you knew the price at which jobbers bought in 24 count that you answered that you referred to the list price of 64 cents.

A. That is right.

Q. And not to the real price or the net price.

A. We had no knowledge of the net price. We had no reason to.

Q. Now, after any such letters as Commission's exhibit 17-F, G and H you learned that that was eight per cent of free deals and samples and, therefore, you could have a variation in price of eight per cent in that particular instance in buying from the Curtiss Candy Company and you were then dealing with the real net, weren't you?

A. Because they furnished us those costs, that is right.

Q. Was that true also of the Schrafft Company, that they showed you that?

A. I don't think that Schrafft ever furnished us a cost breakdown. I doubt it very much.

Q. You will note by looking at that exhibit that the percentage there for free deals, elimination of free goods, deliveries of samples, which is Commission's exhibit 106-F, was to be two per cent to X per cent. I don't know what that means.

A. All right. As I explained this morning in my testimony, this was an overall average taken from those cost sheets that we had received from manufacturers. That does not mean all manufacturers, but those manufacturers that we did have the cost breakdown from; just the same as in that exhibit that the Judge was looking at a moment ago; those are averages. That is what we had found, what was our average in all phases of the business.

Q. Well, in other words, in certain cases, such as the Curtiss Candy Company case, you knew the real net cost of deals and free goods of that company or you would not have put that percentage in.

A. Because in the Curtiss Candy Company there was a deal on every day and we had to find out what the deal was. In other words, if they sold two 24 count boxes of Baby Ruth and gave away a box of Butterfinger, which they frequently did to promote the Butterfinger, you certainly could [fol. 325] get a breakdown of cost without any trouble, if Butterfinger normally was selling for 64 cents, because you had a credit of 64 cents as against that \$1.28 for two boxes.

At this time I would like to call Edward E. Fortier of Brock and Company, adversely. Will you take the stand, Mr. Fortier?

EDWARD E. FORTIER was therupon called as a witness for the Commission adversely and, having been first duly sworn testified as follows:

Direct examination:

Q. Now, Mr. Fortier, give your full name and personal address to the reporter.

A. Edward E. Fortier, 5510 Sheridan Road, Chicago.

Q. Are you with the E. J. Brock and Company?

A. Yes, sir.

Q. In what capacity?

A. Sales manager for Brocks Candies Specialties.

Q. And how long have you been sales manager approximately?

A. Ten to twelve years.

Q. How long have you been with the E. J. Brock Company?

A. 29 years.

Q. Who are the officers of E. J. Brock Company?

A. The officers?

Q. Is it a company or sons?

A. There is a president, Mr. Emil J. Brock; the two sons, Edwin J. Brock, Mr. Frank B. Brock.

Q. What position do they hold?

A. Mr. Emil Brock is the president, Edwin J. Brock is vice-president, Frank B. Brock is vice president.

Q. Is that an Illinois corporation?

A. It is a corporation, but I am not positive it is an Illinois corporation, Mr. Forkner.

Q. Is that all of the officers of your company?

A. No. May I be pardoned?

[cols. 326-357] Q. Go right ahead.

A. I think we have five vice president officers of the company. Mr. C. O. Dicken, Mr. E. W. Kerwin, vice president,

Mr. E. J. Cutgsell, vice president, Mr. E. O. Blomquist, vice president, Mr. Theodore Stempfel, vice president.

Cross-examination.

By Mr. Howrey:

By Mr. Howrey:

Q. Isn't it a fact, Mr. Fortier, that since 1941 your sales to Automatic Canteen Company of America have been at exactly the same price as they were with your other customers?

Mr. Forkner: Just a moment. I object on the ground the record here shows there were no sales made in 1941 or 1942 and sales began only again in 1943. I think the question should be 1943 and then on.

Trial Examiner Bayly: Well, won't this record disclose that information rather than asking witness to give his opinion as to the interpretation of that record?

Mr. Forkner: Yes, your Honor. It would avoid looking in the exhibits if it is in the record. I have no particular—

Trial Examiner Bayly: Ask the witness to give a conclusion based on data in an official record. I haven't any objection to his answering that if he can do it intelligently because the basic data from which he answers would be in the record.

Can you answer that? All right, go ahead.

The Witness: Yes, they had been exactly the same price.

By Mr. Howrey:

Q. The sale in 1940 was merely a test or trial sale, is that correct?

A. Yes, sir.

[fol. 358] COMMISSION'S EXHIBIT 93-Z-63

(Letterhead of Automatic Canteen Company of America,  
Chicago)

August 2, 1946.

For some time, both prior to and immediately following the beginning of the war, Beech-Nut Packing Company supplied a small amount of gum to a very few Distributors, principally in the area close to the Beech-Nut factory.

We have contacted Beech-Nut numerous times during the war for the purpose of trying to augment our supplies of gum. Although at first we were not successful, it was indicated that when possible further consideration would be given to the distribution of Beech-Nut gum through Canteens. Subsequently, a few of our Distributors and recently more of them were able to obtain rather substantial quantities of gum through the Beech-Nut regional sales managers.

At the same time, we kept in touch with the policy-making officials of Beech-Nut and, as a result of the combined efforts and the favorable reports on the distribution of Beech-Nut gum, they have decided to make available a considerable quantity of Beech-Nut gum for allocation to our Distributors in quantities and at locations as determined by us. We believe that they are convinced that our method of distribution is one of the most satisfactory and effective methods of increasing sales of their product and are anxious to furnish this gum at a price which will be attractive to all of us.

However, inasmuch as it may require some time to work out a financial arrangement under which we could handle it, they have agreed for the present to make this quota available to Swan Candy Co. They have requested that the quantities they have been allocating to various operations be maintained for the 12th Period, which will be done, and that, subsequently, allocations be made on a basis that would provide better national distribution, and include as many Distributors as possible.

Beginning with the 13th Period, this quota will be allocated so as to enable as many as possible of our Distributors to benefit from the increased quantities available.

We feel certain that as many Distributors as possible will [fols. 359-363] want to participate in this distribution. The extent to which you cooperate in this procedure and the degree of widespread distribution which results will, in our opinion, determine our eventual ability to secure additional supplies of Beech-Nut gum for you at lower prices. Accordingly, we are attaching a letter reciting the procedure, which you should sign and return if you wish to participate.

Yours very truly, Chairman of the Board, Automatic Canteen Company of America.

COMMISSION'S EXHIBIT 93-Z-64

(Date)

Nathaniel Leverone, Automatic Canteen Company of America, 222 West North Bank Drive, Chicago 54, Illinois.

DEAR SIRS:

We are interested in purchasing Beech-Nut gum from Swan Candy Co. as outlined in your letter of August 2, 1946. We agree to accept such quantities of Beech-Nut gum as Swan Candy Co. is able to allocate, and to pay for such purchase upon receipt of invoices therefor. We understand that Swan Candy Co. will bill us for all shipments at the rate of \$0.545 per hundred sticks, freight prepaid. We also agree to report to you the quantities of such gum received and pay you the sum of 5¢ for each hundred sticks purchased, as we have been doing previously under our supplemental agreement dated \_\_\_\_\_.

Yours very truly, \_\_\_\_\_ (Operation), by \_\_\_\_\_ (Distributor).

[fol. 364]

## COMMISSION'S EXHIBIT 17-C

October 2, 1939.

Mr. W. C. Jakes, Curtiss Candy Company, 622 Diversey Pkwy., Chicago, Illinois.

DEAR MR. JAKES:

We released our October 1st candy list last Friday afternoon after receiving word from you that your Executive Committee had agreed on a new net billing price of \$2.05 per carton of 100 bars. On this list we have included Baby Ruth, Butterfinger and Moonspoon on a freight allowance basis. We are not altogether satisfied with the new bar prices quoted by you but are willing to continue to feature your items with our distributors until such time as we have had a chance to review our average base costs and determine whether it is possible for us to absorb the 7¢ differential.

As we told you when you were in the office the other day, your plant is the only one of all of our sources of supply that has made demands for an increased billing price. Most of the manufacturers are faced with the same increased basic costs as you are but are answering this increase in a gradual reduction in the size of their bars for general distribution. This appears the only logical answer to maintaining proper gross profit margins for the manufacturer in that the five cent bar is so well-established at the retail price that we will have to experience a great deal more change in basic cost before we can think of passing these costs on to the consumer by increasing the retail price.

Very truly yours, Assistant Secretary, Automatic Canteen Company of America.

BIBOID:ES.

[fol. 365] COMMISSION'S EXHIBIT 17-D

Curtiss Candy Company  
Otto Schnering, President  
622 Diversey Parkway Chicago

October 11, 1939.

Mr. R. J. Boid, % Automatic Canteen Co., Merchandise Mart, Chicago, Illinois.

DEAR MR. BOID:

Confirming the writer's conversation with you last Friday at which time we discussed adjustment of the price on past billings, I presented this matter to Mr. Schnering on Saturday and arrived at the following basis:

Originally we increased the billing price from \$1.98 to \$2.00 per carton on September 19th. On September 30th we notified you that effective October 2nd, the billing rate would be \$2.05 per carton, net, fob Chicago, which basis is agreeable to you. Therefore, from the period of September 19th through October 1st, all billings carried the \$2.10 per carton rate. It has been approved by Mr. Schnering that these billings be changed to the old price rate of \$1.98 fob Chicago which was effective prior to September 19th. We have instructed our Credit Department to issue necessary credit memorandums or changes in billing to take care of the above.

We might remind you that we have not as yet received from you our copy of our letter dated September 30th which was to be signed by you acknowledging acceptance of the new billing price of \$2.10 less a freight allowance of 5¢ per carton, making a net price of \$2.05 per carton of 100 bars, fob Chicago. We would like to have this as soon as possible in order that our files may be complete.

Very truly yours, Curtiss Candy Co., (Signed) W. C. Jakes.

WCJ:K.

Copy: T. E. Dilger.

[fol. 366] COMMISSION'S EXHIBITS 17-F TO 17-H.

November 13, 1939.

Mr. Otto Y. Schnering, President, Curtiss Candy Company, 622 Diversey Parkway, Chicago, Illinois.

DEAR MR. SCHNERING:

My attention has been called to the fact that your company has recently increased your billing price on candy bars which we purchase from you. I feel that a very careful examination of the situation will prove not only that this increase is unwarranted but that, in view of all the factors involved in our method of purchasing and in our distribution, we are entitled if anything to a price lower than that paid prior to this increase. Many of the factors involved have been discussed with you and with other members of your organization during the past ten years, but I should like to lay them before you again in concrete form.

First of all, we do all of our buying from you on an f.o.b. factory basis, and it is our understanding that typical outbound freight costs on the type of candy bars we buy from you range from 5% to 7% of your normal jobber billing price.

On the matter of sales costs, it is our understanding that either brokerage or salesmen's salaries in making sales to retailers, jobbers, etc., plus salesmen's and brokers' samples, detail men, and other costs of selling through such channels, typically run at least 7% of the manufacturer's selling price. Obviously, none of these costs are involved in dealing with us. As you know, there is not only no cost involved in having detail men or other representatives contact our distributors; but in fact we do not allow any manufacturers' representative to deal directly with our distributors. Arrangements are made twice a year between officers of our company and the officers of a supplier such as you, and thereafter we place orders daily for our requirements without further solicitation or sales effort of any kind whatsoever.

A third item in the group of strictly economic savings involved in our buying represents, we understand, approxi-

[fol. 367] mately 5% of the selling price, or about 3¢ for 24-count display card. This item is entirely eliminated in our dealings.

Either as part of the selling cost or as a separate factor in itself, the matter of free deals looms up as a substantial importance. As you know, every candy bar delivered to us is paid for in cash within the discount period. We understand that the actual reduction in price as a result of free deals varies from time to time, but we also feel that it should be taken into account very definitely in arriving at a net cash price on such dealings as ours.

Further actual economic factors involved are allowances and returned goods which are inevitable in dealing with a large number of small outlets. No merchandise is returned by us, unless it is unsatisfactory when received, in contrast with the trade custom of returning goods that do not move readily.

To summarize the actual economic savings in our dealings, we believe that the following figures are representative:

|  |     |
|--|-----|
| Freight Savings                        | 6%  |
| Elimination of Sales Costs             | 7%  |
| Elimination of 24-Count Cartons        | 5%  |
| Elimination of returns, and allowances | 1%  |
| Elimination of free deals and samples  | 8%  |
| Total                                  | 27% |

If we were to take an average of these economic savings, or 25%, we would come out at a price of almost exactly \$2.00 per hundred bars on our basis, at which point the manufacturer should be getting exactly the same net price for his products as if he were selling at 64 cents per box and paying these costs.

The advertising value of our distribution in tens of thousands of outlets and the effect of our supplying from daily to once a week fresh Curtiss candy bars to millions of industrial plant employees should be of material value to you. Many of our suppliers have told us that they felt the advertising value of our service alone was worth more than

all of their other advertising; and you, yourself, have advised us of several instances in which the distribution of your products through Canteens has resulted in a marked increase in the sale of your goods in specific territories. We have had numerous examples cited to us of distribution [fol. 368] of new items having been effected by placing these items on sale through Canteens and then following up at materially less than normal cost to take advantage of the demand created.

Our sales are made primarily to industrial plant employees, and we have had repeated instances of evidence that these same employees make extensive additional purchases of your products through other channels when your products have been introduced to them through Canteens. The fact that actual Curtiss candy bars of full size and with the top of the label visible through a glass display are daily in front of employees of thousands of plants and offices means that we are providing to you an advertising service that cannot be duplicated through any other channel. We have proved repeatedly that the freshness of candy bars is of vital importance to their reception by the consumer, and the speed of movement of bars through our channels of distribution from the time they are made in your factories to the time of consumption is insured by the service organization we maintain at a very high cost. Collectively, thousands of hours are spent daily by our service organization in keeping the entire Canteen, particularly our displays of bars, clean and attractive and insuring fresh bars to the consumer. We do not believe that a tremendous number of billboards or extensive space in newspapers and magazines would begin to do you a comparable advertising and merchandising service.

Frankly, we do not feel that you are giving us anything beyond the actual economic cost differentials involved by the form of our buying and that of others who handle your products. We do feel strongly that we are entitled to an additional allowance for the service we render to you, and we urge that you give immediate consideration to the revision of your pricing to us at least to the level heretofore existed. We shall appreciate hearing from you on this

matter, as we believe it to be of vital importance to future plans of both your organization and ours.

Yours very truly, — — —, Administrative Vice President, Automatic Canteen Company of America.

FHAnderson-AS.

[fol. 369]

COMMISSION'S EXHIBIT 82.

(Letterhead of Automatic Canteen Company of America.)

November 15, 1939.

Mr. Otto Y. Schnering, President, Curtiss Candy Company;  
622 Diversey Parkway, Chicago, Illinois.

DEAR MR. SCHNERING:

We have delayed communicating with you on the subject of your recent increase in billing price on the candy bars we purchase from you, because we felt that, with the normalizing of raw materials markets following the false early September boom, this price advance would be only temporary, but it has now continued too long. We feel that a careful examination of the situation will prove not only that this increase is unwarranted, but that in view of all the factors involved in our method of purchasing and in our distribution we are entitled to a price lower than that paid prior to this increase. All the factors involved have been discussed with you and with other members of your organization throughout the past ten years, but I should like to lay them before you again in concrete form.

First of all, we do all of our buying from you on an f.o.b. factory basis, and it is our understanding that typical outbound freight costs on the type of candy bars we buy from you range from 5% to 7% of your normal jobber billing price.

On the matter of sales costs, it is our understanding that

either brokerage or salesmen's salaries in making sales to retailers, jobbers, etc.; plus salesmen's and brokers' samples, detail men, and other costs of selling through such channels, typically run at least 7% of the manufacturer's selling price. Obviously, none of these costs are involved in dealing with us. As you know, there is not only no cost involved in having detail men or other representatives contact our distributors, but in fact we do not allow any manufacturers' representatives to deal directly with our distributors. Arrangements are made twice a year between officers of our company and the officers of a supplier such as you, and thereafter we place orders daily for our requirements [fol. 370] without further solicitation or sales effort of any kind whatsoever. In this paragraph, we are talking entirely of field sales costs, which are, of course, entirely exclusive of your home-office sales overhead.

A third item in the group of strictly economic savings involved in our buying represents, we understand, approximately 5% of the selling price, or about 3¢ for 24-count display carton. This item is entirely eliminated in our dealings.

As an additional and entirely separate factor, the matter of free deals looks up as of substantial importance. As you know, every candy bar delivered to us is paid for in cash within the discount period. We understand that the actual reduction in price as a result of free deals varies from time to time. We know that, at least for certain periods of time and in certain territories, free deals have run as high as 50%, but we are certain if all the free deals involved over a year are analyzed carefully they will average in excess of 8%. This figure should certainly be taken into account very definitely in arriving at a net cash price on dealings such as ours.

Further actual economic factors involved are allowances and returned goods, which are inevitable in dealing with a large number of small outlets. No merchandise is returned by us, unless it is unsatisfactory when received, in contrast with the trade custom of returning goods that do not move readily.

To summarize the actual economic savings in our deal-

ings, we believe that the following figures are representative:

|                                       |     |
|---------------------------------------|-----|
| Freight-saving                        | 6%  |
| Elimination of Sales Costs            | 7%  |
| Elimination of 24-count Cartons       | 5%  |
| Elimination of Returns and Allowances | 1%  |
| Elimination of Free Deals             | 8%  |
| Total                                 | 27% |

If we were to take even 25% as the actual economic savings, you would be receiving exactly the same net price for your products at \$2.00 per hundred bars from us as you would obtain at 64¢ per box of 24 bars and paid these costs:

We have over a long period of years given you a very substantial and very consistent volume of business. During [fol. 371] the first ten months in each of the calendar years 1938 and 1939, we purchased approximately 13,000,000 bars of Curtiss candies. Even in mid summer and in slack seasons our volume in no one month of these years fell below 1,000,000 bars—a factor that should be of vital importance to any manufacturer.

There is an additional important factor involved in our distribution for which we feel you have never given us any allowance, namely the advertising and merchandising value to your company. We want to call your attention to the fact that we are not and have not asked for an advertising allowance, but we feel that it is of actual tremendous value. The advertising value of our distribution in tens of thousands of outlets and the effect of our supplying from daily to once a week fresh Curtiss candy bars to millions of industrial plant employees should be of material value to you. Many of our suppliers have told us that they felt the advertising value of our service alone was worth more than all of their other advertising; and you, yourself, have advised us of several instances in which the distribution of your products through Canteens has resulted in a marked increase in the sale of your goods in specific territories. We have had numerous examples cited to us of distribution of new items having been effected by placing these items on sale through Canteens and then fol-

lowing up at materially less than normal cost to take advantage of the demand created.

Our sales are made primarily to industrial plant employees, and we have had repeated instances of evidence that these same employees make extensive additional purchases of your products through other channels when your products have been introduced to them through Canteens. The fact that actual Curtiss candy bars of full size and with the top of the label visible through a glass display are daily in front of employees of thousand of plants and offices means that we are providing to you an advertising service that cannot be duplicated through any other channel. We have proved repeatedly that the freshness of candy bars is of vital importance to their reception by the consumer, and the speed of movement of bars through our channels of distribution from the time they are made in your factories to the time of consumption is insured by the service organization we maintain at a very high cost. Collectively, thousands of hours are spent daily by our service organization in keeping the entire Canteen, and [fol. 372] particularly our displays of bars, clean and attractive and insuring fresh bars to the consumer. We do not believe that a tremendous number of billboards or extensive space in newspapers and magazines would begin to do you a comparable advertising and merchandising service.

We ask that our former price of \$1.98 per hundred bars be re-established on actual economic grounds alone, but we still feel strongly that we are entitled to an additional allowance for the service we render. We shall appreciate hearing from you promptly on this matter, as we believe it to be of vital importance to the future of our business relationship.

Yours very truly, (Signed) F. H. Anderson, Administrative Vice President, Automatic Canteen Company of America.

FHAnderson—AS

{fol. 373} COMMISSION'S EXHIBIT 83-C.

March 6, 1942.

Automatic Canteen Co., Merchandise Mart, Chicago,  
Illinois.

Attention Mr. R. J. Boid.

DEAR MR. BOID:

Answering your note of February 9th asking for samples of our line for the summer months, please be advised we are mailing you under separate cover twelve bars of each of the two numbers—Baby Ruth and Butterfinger—which we expect to be able to supply you during the next few months.

In submitting these samples we are hopeful, of course, that the situation on raw materials, packing supplies, etc. will not become so critical that our deliveries to you would be seriously effected. In this respect only time will bring the answer, and we hope to be able to continue making sizeable deliveries to you.

Effective April 2, 1942 we are increasing our price to our jobbers from 68¢ to 72¢ per box of 24 bars, and likewise increasing all vending packs. As of that date, therefore, our billings to you will be on the basis of \$2.32 per carton of 100 bars, f.o.b. Chicago. We shall continue to prepay the freight on all shipments, adding this freight to our invoices.

Very truly yours, Curtiss Candy Co., Wm. C. Jakes,

WCJ:K

[fol. 374]

## COMMISSION'S EXHIBIT 28-C.

(Letterhead of Automatic Canteen Company of America.)

March 20, 1942

George Ziegler Company, 412 West Florida Street, Milwaukee, Wisconsin.

Attention: Mr. J. P. Schmidt

DEAR MR. SCHMIDT:

The three bars you submitted have been examined by our Product Committee and approved for general listing in spite of the fact that the price you quoted on Mounties and V Bar are pretty steep for our method of distribution.

Unless you can find some way to adjust this price it will be necessary for us to place some reservation on the quantity of these bars our distributors may be permitted to order. Miss Rector has advised me of her conversation with you and as a result of your production problems, we will release Mounties within the next few days to all our distributors in the southern area—approximately 50 in number. We will forward mailing tickets to be used in sending samples of this item when the release is ready for mailing.

On the 333 Bar and V Bar, we will appreciate it if you will advise us at a later date when you expect to change over your engravers to handle the coating on these items.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid/mr

[fol. 375] COMMISSION'S EXHIBIT No. 28-D.

March 26, 1942.

Automatic Canteen Co., Merchandise Mart, Chicago,  
Illinois.

Attention Mr. R. J. Boid

DEAR MR. BOID:

Answering your letter of March 20 and supplementing our discussion while I was in your office the other day, we are not at this time in a position to do anything further on the price of the "V" Bar and the Mounties. Sorry that that is the case, but conditions are responsible for it.

Very truly, George Ziegler Co., J. P. Schmidt, General Sales Manager.

JPS:T

COMMISSION'S EXHIBIT No. 28-E.

March 8, 1943

Mr. R. J. Boid, Automatic Canteen Co., 1431 Merchandise Mart, Chicago, Illinois.

DEAR MR. BOID:

For your further information, our prices today on Giant Bars packed 24 bars to the box is 68¢ a box, or 2.83¢ per bar. This price is delivered.

Prior to April 1, 1942, we did pack for a few special accounts a 100 count pack at a price of \$2.55 per case, f.o.b. Milwaukee. This made the price 2.55¢ per bar.

At that same time, we also had a price of \$2.65 per case of 100, on a special basis, which is 2.65¢ per bar.

These special 100 count packs, however, have been discontinued by us.

Sincerely yours, George Ziegler Company, J. P. Schmidt, Sales Manager.

JPS:D

[fol. 376] COMMISSION'S EXHIBITS 28-F-28-G.

April 13, 1943

Mr. R. J. Boid, Automatic Canteen Company of America,  
1431 Merchandise Mart, Chicago, Illinois.

DEAR MR. BOID:

Pursuant to our recent discussion as to the method of arriving at the cost on merchandise shipped to you, I would like to give you the following information.

We have taken into consideration in these costs, the lack of credit risk, the saving in packaging, elimination of freight, selling costs, and deductions for returns and allowances.

Setting up a certain amount of merchandise for you has also cut the cost of production to some extent. In addition to all of this, because the type of an organization the Automatic Canteen Company of America is, and the care with which they select their locations, we have considered your outlet a very good advertising and distributing medium.

For your further information, I am attaching a sheet showing our various prices to the regular jobbing trade on three of our items; namely, Giant Bars, Clipper Mints, and Fox Trot Bars. These prices are on a full freight allowed basis. Unfortunately, the prices for 1937 and 1938 are taken from the price list, as we do not have available shipping or posting copies for these two years.

You will also notice that on Fox Trot, we give you this item only for the first four months in 1940, because it was discontinued after that time. We have made notations in the various months showing when we had free deals on these items. We are giving you these figures only up to March 1942, because of the O.P.A. ceiling prices. Prices since that time remain the same.

If there is any further information that you need, please feel free to call on us.

Sincerely yours, George Ziegler Company, J. P.  
Schmidt, Sales Manager.

JPS/D

encl

and send same to National Headquarters. Every Canteen distributor and manager is required to send in the above reports for the Fifth Period.

Reports must be at National Headquarters within ten days after the close of the fifth period.

Starting with Fifth Period reports; it will not be necessary for you to send your check covering same, which is provided for in the Supplemental Agreements. We will charge your account for the remittance due on each report.

Product Department,

[fols. 388-390] COMMISSION'S EXHIBIT 180-Z-3

Canteen Bulletin Product

#159

October 2, 1943.

Thirteenth Period Special Product Reports

We are enclosing a supply of forms to be used in making up your Thirteenth Period Special Product Reports—

Form No. OPR-100

Form No. QPR-101

Form No. MSR-102

Form No. NPR-103

Form No. GPR-104

Every Canteen distributor and manager is required to send in one copy of each of the above reports for the Thirteenth Period. In the event that you have no purchases or sales transactions to report, mark one copy of each form "None" and forward same to National Headquarters. These reports are due Tuesday, October 12. Do not send your check covering amounts due, as we will charge your account for the remittances due on each report.

Product Department

to notify us when you have your cartons printed and are ready to start shipments. We will then give you specific shipping orders.

Very truly yours, F. H. Anderson, Treasurer, Automatic Canteen Company of America.

FHAnderson:RAK

COMMISSION'S EXHIBIT 102-Z-1

(Letterhead of Automatic Canteen Company of America,  
Chicago)

May 15, 1947.

Mr. C. S. Allen  
C. S. Allen Corporation  
100 Water Street  
Brooklyn, N. Y.

Dear Mr. ALLEN:

In reply to your letter of May 10th regarding your product, we have announced its availability to all of our eastern distributors but the great majority of them do not begin to order non-chocolate items in any quantity until the 1st to the 15th of June. I feel that we shall have to wait until we [fol. 393] ascertain somewhat further its salability or until it has been in use in a larger number of eastern operations before we can conscientiously recommend it to our other distributors. Frankly, we must be in position to recommend an item very strongly to persuade our middle-western distributors to handle it if it is available only f.o.b. some eastern point.

If you should be in position to make it available at our present billing price f.o.b. Chicago I am sure we could obtain a much larger volume on it immediately. Please understand that I am not in any way trying to persuade you to do this, but I feel that I must tell you frankly that non-chocolate or summer items which are available f.o.b. Chicago will,

[fol. 377]

## COMMISSION'S EXHIBIT 28-H.

George Ziegler Company  
Milwaukee

## Giant Bars.

|  | 1937 | 1938 | 1939 | 1940 | 1941 | 1942 |
|--|------|------|------|------|------|------|
|--|------|------|------|------|------|------|

|       |  |     |     |      |      |      |      |      |     |
|-------|--|-----|-----|------|------|------|------|------|-----|
| Jan.  |  | .64 |     | .64  | .64  | 1/11 | .64  |      |     |
| Feb.  |  | .64 |     | .64  | 1/11 | .64  | 1/11 | .68  |     |
| Mar.  |  |     | .64 | 1/11 | .64  | 1/11 | .64  | 1/23 | .68 |
| Apr.  |  |     | .64 | .64  | 1/11 | .64  |      |      |     |
| May   |  |     |     | .64  | 1/11 | .64  | 1/11 | .64  |     |
| June  |  |     |     | .64  | 1/11 | .64  |      | .64  |     |
| July  |  | .64 |     | .64  | 1/11 | .64  |      | .64  |     |
| Aug.  |  |     |     | .64  | 1/11 | .64  | 1/11 | .64  |     |
| Sept. |  |     |     | .64  | 1/11 | .64  | 1/11 | .64  |     |
| Oct.  |  |     |     | .64  |      | .64  | 1/11 | .64  |     |
| Nov.  |  |     |     | .64  |      | .64  | 1/11 | .64  |     |
| Dec.  |  |     |     | .64  |      | .64  |      | .64  |     |

To Mar Only

## Clipper Mints.

|       |  |     |  |     |      |     |      |     |
|-------|--|-----|--|-----|------|-----|------|-----|
| Jan.  |  | .60 |  | .60 |      | .60 |      | .64 |
| Feb.  |  | .60 |  | .60 |      | .60 |      | .68 |
| Mar.  |  | .60 |  | .60 |      | .60 |      | .70 |
| Apr.  |  | .60 |  | .60 |      | .60 |      |     |
| May   |  | .60 |  | .60 | 1/11 | .60 | 1/11 | .60 |
| June  |  | .60 |  | .60 | 1/11 | .60 |      | .60 |
| July  |  | .60 |  | .60 |      | .60 |      | .60 |
| Aug.  |  | .60 |  | .60 |      | .60 |      | .60 |
| Sept. |  | .60 |  | .60 |      | .60 |      | .60 |
| Oct.  |  | .60 |  | .60 |      | .60 |      | .60 |
| Nov.  |  | .60 |  | .60 |      | .60 |      | .64 |
| Dec.  |  | .60 |  | .60 |      | .60 |      | .64 |

[fol. 378] COMMISSION'S EXHIBIT 29-J

(Letterhead of Automatic Canteen Company of America,  
Chicago)

August 3, 1936.

Schutter-Johnson Candy Corporation  
1013 N. Cicero Avenue  
Chicago, Illinois

Gentlemen:

In your letters of July 28th and 29th you offer us your "Old Nick" bar for our requirements beginning this Fall at \$2.15 per hundred, specifying that the wrapper is to be sealed.

You are now furnishing us this item at \$2.05 per hundred in the cartoned form which do not have to be sealed and in connection with which we furnish individual bar cartons and shipping cases and at \$2.10 per hundred sealed and packed in cases furnished by you.

We should be glad to continue this item in our line at the current prices but we cannot do so at the new price quoted by you.

It is essential that we have your definite answer on this price immediately because we have today selected all bars to be included in our Fall line and shall release the entire list to our printers in another day or so. Accordingly may we please hear from you by return mail?

Yours very truly, H. Anderson, Treasurer, Automatic Canteen Company of America.

FHAnderson:es

(Written in left-hand margin) Phoned Mr. Anderson 8/4/36. RAHE wants Mr. Wilson to phone him soon as he gets back.

(Stamp) Schutter-Johnson Candy Corp. Received Aug 4  
1936 9 A. M.

## [fol. 379] COMMISSION'S EXHIBIT 29-R

Original letter sent Air Mail—Special delivery to D. C.

Letts Mayflower Hotel Washington, D. C.  
cc. sent to Mr. Boid at Merchandise Mart, Chicago.

March 22, 1943

Mr. Ralph Boid  
Automatic Canteen Company of America  
Merchandise Mart  
Chicago, Illinois

Dear Mr. Boid:

In accordance with our telephone conversation, we are selling our bars to syndicate accounts at \$0.267 a bar.

Very truly yours, Schutter Candy Company, Ralph A. Hull.

RAH:mk

## COMMISSION'S EXHIBITS 88-A-88-B

January 5, 1937.  
Dictated January 4th.

E. J. Brack Company  
4600 W. Kinzie Street  
Chicago, Illinois

Attention: Mr. E. E. Fortier  
Gentlemen:

Some months ago we discussed with you plans for the extensive use of your merchandise. At our convention early in September 1930 we made an especially emphatic presentation of your Brox Bar based on information which you had furnished to us as to the quality of this bar and your advice that it would be in production very shortly thereafter. Upon further advice from you we advised our [fol. 380] distributors that there would be a delay. Although we had advised you quite definitely as to the limit beyond which we could not go in price, we had another bar

—your Zolo Nut Bar—submitted to us at a price in excess of our limit. This was explained to you and since that time we have heard nothing from you.

Please let me hear from you on this Creamy Walnut matter, in particular, and on the general basis on which you expect to do business with us in the future.

Very truly yours, \_\_\_\_\_, Treasurer, Automatic Canteen Company of America.

FHAnderson/RAK

COMMISSION'S EXHIBITS 89-A-89-B

February 9, 1937

Mr. Ed Cline  
Bunte Brothers  
3301 Franklin Blvd.  
Chicago, Illinois

Dear Ed:

Mr. Oltman was down to see us a few days ago, and it occurs to me that I might make perfectly clear our ideas on the subject of additional items which might be supplied to us by your company. Our business is increasing by leaps and bounds, and we have taken on a great many new items from other manufacturers since last fall, but we have not found it practical to take on any additional Bunte items because of the price factor. I have explained to you and to Mr. Bunte in the past that we have no desire to try to drive your price down, but we do have very definite limits beyond which it is impractical for us to go.

The average of all of our merchandise, including shipping cases, runs approximately \$2.03 per hundred, whereas last month, for example, the average cost of items purchased from you was between \$2.12 and \$2.13, or 9¢ to 10¢ a hundred above the average cost of all of our goods. [fols. 384-385] We have also explained to you previously that we are perfectly willing to pay you a premium, and

I think that a great deal of misunderstanding would be eliminated if we would both have in mind that an average price of \$2.10 per hundred on your merchandise will be acceptable to us. Quite obviously it would not take very much to achieve this. One additional item at \$2 or \$2.05 per hundred would bring the average down to \$2.10 even if it did not run into big volume, and then we would be in position to take on such additional acceptable items at \$2.10 as you might submit to us, or again we have no objection to taking on additional items at \$2.15 if you can balance them with other items at \$2.00 or \$2.05.

We find it decidedly advantageous to the manufacturer in keeping his line alive with our distributors, to have new items introduced at least three or four times during the year. We have not introduced any new Bunte items since last fall, or a matter of nearly six months. Accordingly, I would suggest that you plan to present to us one or two items at \$2.00 or \$2.05, and then we would be quite willing to include your Nut Krisp item at \$2.15, or as a step in the right direction we will be glad to approve a Nut Krisp item at \$2.10.

My purpose in writing this letter is to try to clear up this particular point in our buying relationship, and I am sure if we all once understand it thoroughly we will be able to do a great deal more business together.

Very truly yours, — — — — —, Treasurer, Automatic Canteen Company of America.

FHAnderson:RAK

[fol. 384]

## COMMISSIONER'S EXHIBIT 165-X

CC: H. Russell Burbank  
J. H. Daugherty  
Walter Rau

August 20, 1940

Mr. Ralph Boid  
Automatic Canteen Co. of America  
222 West North Bank Drive  
Chicago, Illinois

Dear Ralph:

We wish to confirm our conversation of today when we offered you Pecan Feast packed 100 bars to a carton at \$2.25 per carton delivered anywhere in the United States.

We have figured this very carefully and I was working for a price of \$2.10 but the loss we would take at \$2.10 is much too great for us to absorb. At \$2.25 we are still taking a loss but we feel that this loss would be justified by the publicity our bar would receive by being placed in your machines and that we would probably justify this loss from a standpoint of advertising.

As good as we feel Pecan Feast has been we also feel that we have been able to improve it so that this coming fall, it is our opinion, it should be a bigger seller than ever. Absolutely fresh eating samples of the bar will be furnished to you within the next ten days and in the meantime we would be more than pleased if you could find your way to include it in your fall line.

Yours very truly, Rockwood & Company, Henry W. King.

HWK:gw

[fol. 385]

## COMMISSION'S EXHIBIT No. 179-Z-38.

To: Automatic Canteen Co. of America  
222 No. Bank Drive, Chicago, Illinois

Date 1-22-44  
Operation New York

The following report covers purchases by us of candy bars and other 5¢ packaged goods during the 4th period, 1944, under our supplemental agreement of January 11, 1943.

| Date of Purchase | Total Number of Bars | Name of Item | Purchased from:                   | Name | Address | Pack | Pack Price         | Total Amount of Purchase |
|------------------|----------------------|--------------|-----------------------------------|------|---------|------|--------------------|--------------------------|
| 12/28/43         | 2,880                | Mounds       | Peter Paul, Inc.—Naugatuck, Conn. |      | 24      |      | .68                | 81.60                    |
| 1/10/44          | 11,520               | Nestles      | Lamont, Corliss & Co.—N. Y. C.    |      | 576     |      | 16.32              | 326.40                   |
| 1/11/44          | 4,320                | Milk Feast   | Rockwood & Co.—Brklyn, N. Y.      |      | 24      |      | 2.66 $\frac{2}{3}$ | 115.20                   |
| 1/13/44          | 9,600                | M & M        | M & M Limited—Newark, N. J.       |      | 24      |      | .68                | 272.00                   |
| 1/15/44          | 14,400               | Hy-Bar       | Surprise Candy Co.—N. Y. C.       |      | 48      |      | 1.36               | 408.00                   |
| 1/18/44          | 9,600                | Hy-Bar       | Surprise Candy Co.—N. Y. C.       |      | 48      |      | 1.36               | 272.00                   |
| 1/21/44          | 4,320                | Pecan Feast  | Rockwood & Co.—Brklyn, N. Y.      |      | 24      |      | .67                | 120.60                   |
| 1/22/44          | 14,400               | Hy-Bar       | Surprise Candy Co.—N. Y. C.       |      | 48      |      | 1.36               | 408.00                   |

Total 71,040 Total Bars Purchased 71,040 Amount Due A.C.C. or A. at \$.10 a Hundred \$71.04

J. T. Collins (Distributor) hereby certifies that he has read the above report of purchases; that it was prepared by him, or under his direction; that it is true and accurate, and that there is included all purchases made by him during the period of such report, from all sources included under above supplemental agreement.

OPR-100

Signed

Distributor

[fol. 386]: COMMISSION'S EXHIBIT 180-B

(Letterhead of Automatic Canteen Company of America,  
Chicago).

June 14, 1946.

Attention: Miss Louise Engram

Operation: New York; New York.

Dear Miss Engram:

Thank you for your 9th period Special Product Reports, but the word "various" on LBR-170 is not specific enough. We would appreciate receiving by return mail the name of suppliers, name of bars, pack, pack price and total bars purchased from each, as requested on the form.

Very truly yours, H. A. Daus, Office Manager.

HADaus/ir

[fol. 387] COMMISSION'S EXHIBIT 180-Z-1

Canteen Bulletin Product

#121

February 13, 1943.

Important

Attached is a supply of forms to be used in making up your Fifth Period Product reports:

Form OPR 100—per instructions in Bulletin No. 115, report all purchases from local sources of supply during the Fifth Period. Remittance rate is 10 cents per hundred.

Form OPR 101—per instructions in Bulletin No. 115, all receipts of Clark Bar, Zag Nut, Swing Bar, and Brunch Bars are to be reported on this form. Remittance rate is 25 cents per hundred.

Form MSR 102—per instructions in Bulletin No. 115, all sales transacted under Military agreements should be reported for the Fifth Period. Remittance rate is 25 cents per hundred.

In the event that you have no purchases or sales transactions to report on the above forms, mark each form "none"

[fol. 391] COMMISSION'S EXHIBITS 102-L TO M

(Letterhead of Automatic Canteen Company of America,  
Chicago)January 11, 1937.  
Dictated January 8th.

Mr. John A. Schillinger, Sales Manager  
C. S. Allen Corporation  
100 Water Street  
Brooklyn, New York

Dear Mr. SCHILLINGER:

We have not overlooked the sample packages which you sent in but thought it unwise to introduce any new items until after the first of the year. I believe in my last conversation with you I advised you that if you were willing to make up a moderate quantity—say 25,000—of the special sized cartoned we would give the item a trial in two or three of our eastern operations, and then if we found it satisfactory we would be glad to put it into much wider distribution.

This does not mean that we would want 25,000 delivered at one time, but in somewhat smaller quantities over a test period of thirty to sixty days. This program was to be [fol. 392] based on your willingness to supply this item at not to exceed \$2.05 per hundred, f.o.b factory; the \$2.00 a hundred representing our standard price for merchandise, and the 5¢ a hundred being allowed to cover the cost of the 100-count shipping container.

I believe you understood our standard procedure also of shipping all merchandise in 100-count corrugated containers rather than the 24-count boxes.

We realize that on a small carton such as this sort you would probably not only not make no profit, but perhaps incur some loss, but that this would be entirely different if the item proves to be satisfactory and we can handle it in a volume comparable to our other items which range from 100,000 per month up.

If this program meets with your approval it will not be necessary for you to correspond with us further, except

obviously, move in much greater volume in the middlewest than those items on which freight must be paid from the east.

Very truly yours, F. H. Anderson, Treasurer, Automatic Canteen Company of America.

FHAnderson:RAK

[fol. 394] — COMMISSION'S EXHIBIT 86-D

May 19th, 1937.

Mr. F. H. Anderson,  
Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

DEAR MR. ANDERSON:

Thank you very much for yours of May 15th and we have checked and rechecked our cost on your item and frankly much as we would like to, it is a physical impossibility to sell our line to you f.o.b. Chicago.

On making inquiry on the price of the cartons we find there is a 25% advance and even the containers are up just as much, plus of course the fact that even the raw material we use has gone up since we quoted you.

We would very much like to get that additional business to help us on our volume and we appreciate very much the offer you have made, but we are sorry that we cannot accept for the time being.

Kind regards.

Yours very truly, C. S. Allen Corp., C. S. Allen,  
President.

CSA:JC

[fol. 395] COMMISSION'S EXHIBITS 102-Z-5 TO 102-Z-6

(Letterhead of Automatic Canteen Company of America,  
Chicago)

## Requirements for Canteen Fall Merchandise.

## 1. Bar Weights

All items furnished to us must be of the same weight and quality as the item sold by the manufacturer through the jobbing and retail trade. Shape of bar may be different to fit our cartons when approved by us. In general, uncartoned items may be not to exceed one inch beyond the length of your individual bar carton. Immediately Upon Receipt of This Memorandum Please Write Us Specifying Your Guaranteed Minimum Weight of Each Item Approved.

## 2. Cartoned Items

Individual bar cartons will be furnished by us without charge to the manufacturer, with a specific number assigned to each item. Please keep our Mr. Athur C. Schaeft advised in ample time in advance of your carton requirements. He will also assign numbers for each item. It is imperative that carton flaps be pressed in far enough to insure the locking of the carton as if the end comes out Standard Canteens become locked up and your sales and ours stop. However, it is equally important that these ends are not forced in too far. Complaints have been received of carelessness on the part of packers in packing from one to several empty bar cartons in shipping cases. These empty cartons are frequently scattered through the case and hence our conviction that they do not result from the opening of the shipping case in transit. All cartoned merchandise is to be packed 100 bars to a shipping case.

## 3. Uncartoned Bars

All wrappers on uncartoned bars must be completely sealed. If any manufacturer is unfamiliar with our requirements on uncartoned bars he should contact us immediately. All uncartoned bars are to be packed 1000 to a corrugated shipping container with layer board or parti-

tions when necessary to insure satisfactory shipment. Merchandise must fit snugly into shipping cases to avoid scratching or marring in transit, and must be of such dimensions as to avoid crushing of merchandise when cases are stacked up.

#### 4. Sealing of Cartons

All cartons should be sealed by gluing the flaps in order to insure against pilferage of contents of shipping cases when in transit.

#### 5. Product Liability Protection

Each manufacturer should provide us with a Certificate of Insurance covering Products Liability.

#### 6. Wrappers

All wrappers on merchandise sold to us, whether cartoned or uncartoned must bear the Canteen Imprint. Please check with us immediately should any question arise on the use of this imprint.

#### 7. Samples

125 sets of samples, of two bars of each item approved, uncartoned packed in sample boxes and tissue wrapped. Or Otherwise Packed to Insure Shipment without marring, should be sent to 4633 Gladys Avenue, Chicago, Illinois, immediately, with cases clearly marked "Distributors' Samples." Where wrappers bearing Canteen Imprint have not been completed we will accept manufacturer's regular wrapper on samples, but wrappers of all items shipped on our order must bear this imprint. All samples must be absolutely identical with merchandise to be shipped subsequently. We have had oversize samples sent out by some manufacturers in the past and then sales killed when merchandise shipped was not equal in every respect to samples.

At All Times All Invoices Must Be Sent to Automatic Canteen Company of America, 1430 Merchandise Mart, Chicago, Illinois. No Invoices or Prices Are Ever to Be Given to Distributors or Branch Managers.

## [fol. 397] COMMISSION'S EXHIBIT 102-Z-7

Mr. R. J. Boid, Automatic Canteen Co. of America, Rm. 1430,  
—Mdse. Mart, Chicago, Ill.

Dear Mr. Boid:—

Answering your letter of August 13th outlining your various requirements on future shipments to you, we are in a position to comply with all your requests with the exception of #6.

Re Par. #5: Our Products Liability insurance is covered by Binder #2736 Lloyds of London.

Re Par. #6: Please be advised that the package we have been shipping you was created exclusively for your use and inasmuch as they have already been printed and made up, we cannot add a Canteen imprint to same.

We will send you the 125 sets of samples as requested, and trust that you will receive them in sufficient time.

If we can be of any further assistance please command us, and thanking you for your past favors, we are,

Yours very truly, C. S. Allen Corp., — — —, Sales Manager.

JAS:JC

## [fol. 398] COMMISSION'S EXHIBIT 102-Z-43

October 6th, 1938

Mr. Anderson, Automatic Canteen Co. of America, Rm. 1430,  
Merchandise Mart Bldg., Chicago, Ill.

Dear Mr. Anderson:—

In March of 1937 you gave us instructions to order 250,000 cartons for your machines.

Up to date we are sorry to say we have 208,000 left, at a cost of \$2.56 M.

May we ask you either to be kind enough to place orders to get this merchandise off our hands, or may we bill you for same.

Yours very truly, C. S. Allen Corp., — — —,  
President.

CSA:JC

## COMMISSION'S EXHIBITS 102-Z-56 TO 102-Z-57

(Letterhead of Automatic Canteen Company of America,  
Chicago)

February 8, 1939.

Mr. C. S. Allen, C. S. Allen Corporation, 100 Water Street,  
Brooklyn, New York.

Dear Mr. Allen:

In an effort to clear up inventory on cartons especially ordered for our account, we have made a move with our distributing field that is ordinarily not considered good business on our part; namely, that of trying to get our distributors to assist us in clearing up any inventory that we might have at your plant. Some small orders have originated out of this move but we do not believe that sufficient [fol. 299] client orders will come out of it without a reasonable period time to greatly improve the inventory situation.

It is possible that during the summer months we can get a better play on Allen Toffee than we can at this time of the year when the predominant volume is toward solid chocolate goods. It was with this thought in mind that we directed a letter to you the other day to see if you could not give us some assistance in cleaning up this carton inventory. If it were not for the freight costs from Brooklyn to Chicago we could easily dispose of a quantity of these cartons to some outside merchandising organization. This again is contrary to our usual moves. On the other hand, it becomes expedient sometimes to do the unusual.

As a feeler on this before directing a letter to you we contacted two chain merchandising organizations in Chicago, and find that they would be willing to go to work on this item if a special price consideration were given them; that price consideration we determined in making these contacts is about the differential between the f.o.b. plant and the Chicago price; namely, 18¢ to 20¢ per carton freight costs. In view of this reaction we wondered if you would not be good enough to have your men contact some of the chain organizations in the New York area to see if they could not use a large quantity of this item as a special sales.

feature at a price that would be attractive to them and would still let your organization and ours out without having to assume a loss on cartons.

We should appreciate it very much if you would consider this further and let us hear from you.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid:ES

[fol. 400] COMMISSION'S EXHIBIT 102-Z-58

February 13th, 1939.

Mr. R. J. Boid, Automatic Canteen Co., Merchandise Mart,  
Chicago, Ill.

Dear Mr. Boid:

We have read with considerable interest yours of February 8th and we are delighted to know that we are going to get some co-operation on the part of your managers in moving the cartons we have on hand for you.

To show our good will, we are prepared to take a small loss and quote you \$1.95 C delivered in Chicago, if that will be of any assistance to you.

We feel that if you insist upon the men putting the package in the machines, you can get some repeat orders, but as far as we can see, the distribution has been exceedingly small ever since we started with this line.

Hoping to hear from you, we are,

Yours very truly, C. S. Allen Corp. — — —  
President.

CSA:JC

[fol. 401] COMMISSION'S EXHIBIT 102-Z-59

(Letterhead of Automatic Canteen Company of America,  
Chicago)

February 16, 1939.

Mr. C. S. Allen, President C. S. Allen Corporation, 108  
Water Street, Brooklyn, New York.

DEAR MR. ALLEN:

We appreciate very much your offer of cooperation in the handling of the Allen Toffee item in our Chicago-area as suggested by your letter of February 13.

We are not just sure whether you mean that the price of \$1.95 delivered in Chicago applies only to goods moved to Chicago, or whether you infer that you are willing to make a price concession that we may pass on to our distributors as a possible incentive to get them to give a little more attention to the item; on shipments going direct from your plant to points in the eastern area, as well as those moving through Chicago.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid/TWW.

[fol. 402] COMMISSION'S EXHIBIT 106-A

February 6, 1937.

Automatic Canteen Company of America, The Merchandise  
Mart, Chicago, Illinois.

Attention: Mr. W. E. Swanson

GENTLEMEN:

Since our interview recently with Mr. Swanson and Mr. Andruss of your Company, and Mr. Walker of the National Shawmut Bank, we have not been able to find a satisfactory way to seal the ends of our foil wrappers for 5¢ Bars. However, we are still experimenting and hope to solve this problem eventually.

As you know, the wrappers on our 5¢ Cellophane Packets are sealed and we have a number of items in this Line which we believe will fit your machines.

On the basis we discussed, that is, the Automatic Canteen Company to furnish us free of charge with suitable corrugated shipping containers to hold 100 five-cent numbers, and with the understanding that shipments in reasonable quantities will be made to your several warehouses, we are pleased to quote you, subject to change without notice, a price of \$2.375 per carton of 100 pieces, f.o.b. Factory, no freight allowed. This price does not include our furnishing any advertising material. Our terms are 2% in ten days from date of shipment or thirty days net.

We shall be glad to submit samples on request of the various items in our 5¢ Cellophane Packet Line which we believe will answer your requirements and shall hope to hear from you favorably within a few days.

Very truly yours, W. F. Schrafft & Sons Corp.

JMG:EMS.

[fol. 403] COMMISSION'S EXHIBITS 106-E to 106-G-1

(Letterhead of Automatic Canteen Company of America,  
Chicago)

February 15, 1937.

Mr. J. M. Gleason, Sales Manager, W.F. Schrafft & Sons Corporation, Sullivan Square, Charlestown District, Boston, Massachusetts.

DEAR MR. GLEASON:

Our Vice President, Mr. Swanson, has gone over with me his discussion of a few weeks ago with you at your plant, the correspondence since that time, and the samples of your cellophane wrapped items which have been received by us. We feel that there are a number of items in this line which might receive favorable action by our committee, and which if placed in distribution throughout our organization would produce a very substantial volume of sales.

However, we must be quite frank in telling you that at the price quoted by you we should be subjected to a net loss on each shipment we would make.

I want to take the liberty of laying before you factors that have been discussed with us by our suppliers as being eliminated in our very extensive purchases.

We do all of our buying on an f.o.b. factory basis, and our suppliers advise us that their freight costs range from 5% to 7% of the billing price.

On the matter of sales cost the manufacturer usually pays a broker 5% and then in addition has extensive overhead sales costs, salesmen or brokers' samples and many other selling costs to take into account which do not enter into our buying. Once we approve an item orders flow thru to the manufacturer every day. There is no occasion whatever to have any salesman in touch with us and we do not permit manufacturers' representatives to make any contact with our distributors. Our suppliers advise us that the typical candy manufacturer can be well satisfied if he can operate within a total selling cost of 7%.

They also advise us that typically 5% of the selling price, or just over 3%, will cover the 24-count carton or retail counter display carton. Further factors are moderate al- [fol. 404] lowances for return goods and credit losses which are inevitable in dealing with a large number of jobbers. Likewise, most manufacturers use free deals to push one or more items in their lines several times during the year, or make allowances in some other form such as extensive counter display material.

To summarize on the actual economic savings or element of costs in our dealings, we are advised that the following figures are typical.

|   |            |
|---|------------|
| Freight                                 | 5% to 7%   |
| Sales costs                             | 7%         |
| 24-count cartons                        | 5%         |
| Return and allowances for credit losses | 1% to 2%   |
| Free deals and samples                  | 2% to X%   |
| Shipping containers                     | 1% to 2%   |
| <br>                                    |            |
| Total                                   | 21% to 25% |

If we were to take an average of these economic savings, or 23%, we would come out at a price of approximately \$2.05 per hundred at which point the manufacturer should be getting exactly the same net price for his products as if he were selling at 64¢ per box and paying these costs.

There are two less tangible factors, but at least one of them a very important factor, involved in our buying. These two are the advertising value of our distribution in tens of thousands of outlets and the effect of our large scale purchases on the manufacturer's production cost. Many of our manufacturers have told us that they felt the advertising value alone was worth more than all of their other advertising, and we have been advised of innumerable instances where the distribution of a manufacturer's products thru Canteens has resulted in a marked increase in the sale of his goods at his jobbing price throughout his sales territory.

Assume that the figures quoted in this letter, which, as I have stated, are taken entirely from some of our present suppliers, may differ from your costs to some extent there is still a wide margin between the price of \$2.375 per hundred quoted by you and the figure of \$2.05 per hundred that would result from a 23% elimination of cost factors.

Our very able legal counsel have advised us that in their opinion there is no possible question as to the right of a manufacturer to make these eliminations of economic cost, [fol. 405] and they have also advised us that in their opinion any manufacturer has a right to make a definite allowance for an advertising or merchandising service that is actually rendered.

We will greatly appreciate your reviewing this subject again and we trust that there will be an opportunity for us to start a mutually satisfactory and profitable relationship.

Very truly yours, F. H. Anderson, Treasurer, Automatic Canteen Company of America.

F. H. Anderson:RAK.

## COMMISSION'S EXHIBIT 106-G-2

February 20, 1937.

Mr. F. H. Anderson, Treasurer, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois.

DEAR MR. ANDERSON:

When your letter of the 15th was received, it was turned over to our Cost Department for careful consideration.

We regret that Mr. Swanson did not have time to go through the factory when he was here, as he would have realized at once that, by comparison with other plants he has visited, our manner of operating is quite different. The superior quality of the materials used in the manufacture of our products, our rigid adherence to established standards, combined with the unusual precautions we take to insure uniform quality, will not permit of our meeting the lower prices quoted by other bar manufacturers, as indicated by your letter, in spite of the fact that we have perhaps the most scientifically arranged factory, from a production standpoint, of any in the country.

The savings which would result in doing business with your company, as compared with our jobbing outlets were all taken into consideration in arriving at the figure quoted in our letter of February 6th. Our freight costs are probably not over half of the figure you specified. Our sales cost and carton cost are much lower. We do not offer free deals and our sampling expense is very moderate.

[fol. 406] We fully appreciate the advertising value which we would derive from having our 5¢ numbers sold in your machines and the additional volume of business which this would mean. However, we attribute, to some extent, whatever success we have attained to the fact that we have always refrained from taking any business on which a legitimate profit cannot be secured. On that basis the price we have made is the very lowest which we are able to offer.

The vending machine business has, in the past no doubt, been adversely affected by the offering of poor quality merchandise due, in a measure, to the necessity for obtain-

ing goods at very low prices. We feel that we are not egotistical in saying that we believe the name Schrafft will be of some benefit to you, or to any concern operating as you do.

As our products are sold to a comparatively small selected list of the best Wholesalers in the country, our distribution naturally is not as extensive as that of manufacturers who sell indiscriminately to all jobbers of candy. However, consumer acceptance for the Schrafft Line is demonstrated beyond all reasonable doubt by the fact that our business has developed throughout the years, due almost entirely to word-of-mouth advertising.

We would like to have you give careful consideration to the foregoing and feel sure that a trial for a reasonable length of time will prove that our Line of Cellophane-wrapped Packets will be profitable to you on the basis of our quotation.

Very truly yours, W. F. Schrafft & Sons Corp., J. M. Gleason, Sales Manager.

JMG:EMB.

[fol. 407] COMMISSION'S EXHIBITS 106-J TO 106-K

March 20, 1937.

Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois.

Attention: Mr. F. H. Anderson, Treasurer

DEAR MR. ANDERSON:

At the close of our conference last Monday, you said that you presumed the margin of profit differed, to some extent, on the various items in our 5¢ Line and suggested that there might be certain numbers with which we could furnish you at \$2.22 per hundred, the figure you named as the limit that it would be possible for you to pay.

I, accordingly, took this matter up with our Cost Depart-

ment and am glad to say that we can offer you the following 5¢ numbers at that price:

5¢ Bars: Butterscotch and Cream  
Cream Almond  
Krinkle  
Nifty

5¢ Cellophane Packets:

Opera  
Peppermint  
Sour Orange

The wrappers on the Foil-wrapped Bars are not sealed, as you know, and the Krinkle Bar, at the present time, may be a little too long for your machines. However, we might, in time, decrease the length of this Bar slightly, so that it would fit.

The wrappers on the 5¢ Cellophane Packets are, of course, sealed.

We shall look forward to hearing from you as soon as you have had an opportunity to discuss the possibilities of the Schrafft Line with your associates.

Very truly yours, W. F. Schrafft & Sons Corp., J. M. Gleason, Sales Manager.

JMG:EMB:C.



[fol. 408] COMMISSION'S EXHIBIT 106-Q

April 8, 1937.

Automatic Canteen Company of America, Merchandise Mart, Chicago, Illinois.

GENTLEMEN:

Thank you very much for the order placed yesterday by Mr. Andruss. The invoice covering this shipment is enclosed. The price at which the goods are billed is the same as that quoted in our letter of March 20th, plus the additional expense for carton cost, amounting to 13.6 cents

for Bars and 11.4 cents per carton for 5¢ Cellophane Packets.

Quotations on corrugated cartons are being obtained by our Purchasing Department. Should we find them in excess of the price which you have been paying, we shall notify you before placing an order. As you undoubtedly know, corrugated board was advanced in price the first of the month.

We greatly appreciate receiving this order, which we trust marks the beginning of very pleasant business relations between us.

Cordially yours, W. F. Schrafft & Sons Corp., J. M. Gleason, Sales Manager.

JMG:EMS.

[fol. 409] COMMISSION'S EXHIBITS 106-T TO 106-U

September 8, 1937.

W. F. Schrafft & Sons Corporation, Sullivan Square,  
Charlestown District, Boston, Massachusetts.

Attention: Mr. R. F. MacKendrick

GENTLEMEN:

We note that you are deeply concerned over paragraph 6 of our specification regarding the imprinting of wrappers. While this is a standard requirement as a means of identification there are several different methods of applying this imprint; first, a number of our manufacturers are using an imprinted wrapper; second, some are using imprinted tape which is part of the sealing process and third, others are perforating the initials "ACC" or the entire word "Canteen" along the side or end of the wrapper.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid:ES.

## [fol. 410] COMMISSION'S EXHIBITS 106-Z TO 106-Z-1

October 4, 1937.

W. F. Schrafft & Sons Corporation, Sullivan Square,  
Charlestown District, Boston, Massachusetts.

Attention: Mr. R. F. MacKendrick

GENTLEMEN:

Carton Invoices—We have returned to you a number of invoices covering the cost of 100-count cartons to be used in packing your product for our organization. Under date of September 30 you returned invoices and called attention to Mr. Gleason's letter of February 6, 1937. It is true the subject of cartons was mentioned in this letter along with the original price quotation made by your company. Following that letter there was a series of letters and personal interviews in which the problems involved in placing the Schrafft items into our line were fully discussed. We direct your attention to letter from Mr. Anderson addressed to Mr. Gleason under date of February 15, 1937; Mr. Gleason's answer to Mr. Anderson under date of February 20; Mr. Anderson's answer to that letter under date of March 11 and a final answer following Mr. Anderson's call at your plant on or about March 15. This final answer, in the form of a letter from Mr. Gleason dated March 20 clearly stated in the opening paragraph of that letter "At the close of our conference last Monday, you said that you presumed the margin of profit differed, to some extent, on the various items in our 5¢ line and suggested that there might be certain numbers which we could furnish you at \$2.22 per hundred; the figure you named as the limit it would be possible for you to pay."

Pencil notes made by Mr. Anderson while in conference at your plant with Mr. Gleason do indicate that they arrived at an inclusive maximum billing price of \$2.22 on each 100 bars of your product for our use. In discussing this matter with Mr. Anderson he advises that an agreement was reached on the question of quantities of cartons

to be used in the original spring test. This agreement was [fol. 411] to the effect that, should any cartons remain in your possession on items not to be continued in our line, we would assume the cost. We are confident that Mr. Anderson referred your Purchasing Department to suppliers of corrugated cartons and suggested that they check with our Purchasing Department for comparative prices only in an effort to hold the cost of these cartons at a minimum. This is a standard policy in dealing with all of our suppliers, not only on the question of purchasing cartons, but also on purchasing wrappers, seals and any other material needed in our method of merchandising.

We regret very much that there appears to be some confusion in the billing of product ordered from your plant and hope that this will serve to clear up the matter.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid:ES.

Encl.

COMMISSION'S EXHIBIT 106-Z-2

(Letterhead of W. F. Schrafft & Sons Corporation, Boston,  
Massachusetts)

October 5, 1937.

Mr. J. M. Gleason  
% Medinah Club  
505 North Michigan Blvd:  
Chicago, Illinois

Dear Mr. Gleason:

Inclosed are copies of a letter and a list of unsalable goods received today from Mr. Andruss of the Automatic Canteen Company of America, Cambridge Branch. I shall be glad to take care of this if you will let me have your instructions.

Incidentally, the Sour Orange and Dark Peppermint Packets are not included in the Fall list and it is doubtful, [fol. 412] according to a conversation which Mr. Crouse had with Mr. Andruss, if the Canteen Company will order any

of these this Fall. We have the following stock of each, packed 100's:

87 Cartons Dark Peppermint Packets

69 Cartons Sour Orange Packets

In addition, we have in stock 328 empty cartons for Dark Peppermint Packets and 325 empty cartons for Sour Orange Packets, which appear to be too small to be used for any of the 5¢ numbers that the Canteen Company is now ordering.

Cordially yours, R. F. M.

R.F.M.:EMB

Incls.

10/14/37.

Mr. Andruss was present when the basis on which we were to quote Automatic Canteen was outlined by Mr. Anderson. It was definitely stated that we would not have to suffer any loss as a result of goods becoming damaged. Mr. Anderson repeated that statement when I was in his office Monday.

It was also understood that we would be reimbursed for any reasonable amount of supplies which were purchased purposely to take care of our business with them if any items they had been handling were dropped by them and then supplies became valueless to us in consequence.

J. M. G.

[fol. 413] COMMISSION'S EXHIBIT 105-Z-5

October 18, 1937

Automatic Canteen Company of America

25 Otis Street

Cambridge, Mass.

Att'n of Mr. Lee J. Andruss, Mgr.

Dear Mr. Andruss:

Confirming our telephone conversation of this date, on the subject of your letter of September 30th, which had been referred to Mr. Gleson, may we remind you that it was definitely stated at the time we entered into an agree-

ment with the Automatic Canteen Company of America that we would not have to suffer any loss as a result of goods becoming damaged. At a conference between Mr. Gleason and Mr. Anderson in the latter's office in Chicago on the 11th, this arrangement was acknowledged by Mr. Anderson; consequently, the damaged goods listed in the schedule attached to your letter of September 30th are not returnable.

Please accept our thanks for your good offices in connection with the Peppermint Packet and Sour Orange Packet which we put up for the Automatic Canteen Company of America and which are not being ordered this Fall.

Very truly yours, W. E. Schrafft & Sons Corp.

RFM:ackKendrick:AT:C

[fol. 414] COMMISSION'S EXHIBIT 106-Z-11

April 18, 1941

Automatic Canteen Company of America  
Merchandise Mart  
Chicago, Illinois.

Gentlemen:

Although several checks have been received recently on which unearned discounts were taken, we have accepted them as full payments, for we felt that when Mr. Gleason explained our terms to you in Chicago you would be willing to make payments in accordance with them. We find, however, that the check received this week again took discount on bills overdue on discount terms.

Mr. Moore informed Mr. Gleason that you pay the bills of all your suppliers on the same basis as you wish to pay ours. We do not understand this, however, for seven of your suppliers have reported that their terms are 2%—10 days, two that their terms are 1%—10 days, four that their terms are 2%—15 days, one that the terms are one-half of 1%—10 days, and four that their terms are net 30 days. We are inclined to think that Mr. Moore meant that you make remittances on Fridays only, and not that you pay all creditors in exactly the same way.

As we have mentioned in previous letters, you are prohibited by law in taking and we are prohibited in giving you terms better than those given to anyone else with whom we do business. Since we understand that your method of making payments is solely for the purpose of simplifying office procedure, may we suggest that you remit each Friday in payment of the bills received the preceding week, and not the week preceding that. In this way you would need to make out only one remittance a week and we would be able to allow the discount on all the invoices.

Very truly yours, W. F. Schrafft & Sons Corporation,  
By: Laurence S. Day.

LSD:ATC

[Tol. 415] COMMISSION'S EXHIBIT 106-Z-19

October 6, 1941  
Air Mail

Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Illinois

Attention—Mr. R. J. Boid

Dear Mr. Boid:

Your letter of the 2d, addressed to Mr. J. M. Gleason at Columbus, has been forwarded to us for our attention.

Owing to the increased cost of materials used in the manufacture of our products, we were obliged to advance prices on all our 5¢ Bars, effective at the close of business October 1, 1941. As of to-day, our stocks of the following Canteen Co. Bars are as follows:

|                          |      |
|--------------------------|------|
| Butterscotch & Cream Bar | 359  |
| Caramallow Bar           | None |
| Cream Almond Bar         | 377  |
| Krinkle Bar              | 402  |
| Peanut Crackle Bar       | 271  |
| Mint Opera Packets       | 854  |

Aside from the 5¢ Mint Opera Packets; there appears to be approximately two or three weeks' supply of the other numbers which is on hand. When these goods have been shipped on your Distributors' orders, it will be necessary for us to increase the price 16¢ per box, making your cost \$2.38 per box of 100 Bars—exception—since the present price to our Jobbers of 24-count 5¢ Cream Almond Bars has been advanced to 68¢, this item will have to be billed to you at 2.56 per box of 100 Bars, when our present stock is exhausted.

Will you please advise us, at your early convenience, what your estimated requirements for the balance of the year will be of the above-mentioned items at the new prices?

With kind personal regards, we are

Very truly yours, W. F. Schrafft & Sons Corp., By:  
H. H. Sprague.

HHS:EMB

[fol. 416] COMMISSION'S EXHIBIT 106-Z-21

(Letterhead of Automatic Canteen Company of America,  
Chicago)

October 7, 1941

W. F. Schrafft & Sons Corporation,  
Sullivan Square,  
Boston, Massachusetts

Attention: Mr. H. H. Sprague

Dear Mr. Sprague:

We have your letter of October 6 and are immediately notifying our distributors that as soon as current inventories of 5¢ bars prepared for us have been exhausted, your items are discontinued from our lists.

We will appreciate it if you will cancel and notify our office of all orders received from distributors after present inventories have been completely withdrawn. In cases where you can make only partial shipment due to lack of inventory, please do so and notify us of the amount canceled.

We regret that we find it necessary to withdraw your product from our list but the current price increase makes it prohibitive to continue to furnish these bars under our present arrangement with our distributors.

With kindest regards,

Very truly yours, R. J. Boid, Assistant Secretary  
Automatic Canteen Company of America.

RJ Boid/mr

[fol. 417] COMMISSION'S EXHIBIT 126-II

(Letterhead of Automatic Canteen Company of America,  
Chicago)

November 28, 1939.

Mr. S. A. H. Rush, Squirrel Brand Co., 10-12 Boardman St.,  
Cambridge, Massachusetts

Dear Mr. Rush:

We enjoyed very much our short visit with you the other day while in Boston and was glad to have your letter of November 23rd quoting us on the various nut mixtures. The price differential between your quotations and the quotations we have out of Brooklyn and Philadelphia do not offset the freight cost for delivery from these points to the New England areas and the listing of your house as a source of supply on our regular monthly nut bulletin issued to our distributors would not promote the withdrawal of nuts from your organization due to this price differential.

By using the method of listing all available sources of supply with the base price from each source we leave the selection of the source of supply entirely up to our distributors.

Your Medium Blanched Virginia quotation is in line with what we are paying. Spanish and #1 Mixtures are a fraction over what we are paying; and #4 Mixture shows a differential of over 1½¢ per pound.

Before taking further action on listing your house as a source of supply we wanted to point out to you these facts and will appreciate hearing from you.

Very truly yours, R. J. Boid, Assistant Secretary  
Automatic Canteen Company of America.

RJ Boid:ES

[fol. 418] COMMISSION'S EXHIBIT 126-F

December 5, 1939.

Mr. R. J. Boid, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois.

Dear Mr. Boid:

Replying to your letter of November 28 the contents have been carefully noted. The prices which I have made you in my quotations of November 23rd are the lowest prices which we can make. I cannot tell you why the discrepancy in price exists. We have marked our merchandise to the lowest price possible.

The merchandise which we will furnish you will be superior in every way and I know it will help to build your sales and that it will conform with your general principles of doing business, namely to supply the finest product possible in your machines. I hope that you will be able to use our candy items on which I have quoted you and samples of which I have sent you.

Your orders will be appreciated and will have our most careful attention.

Very truly yours, Squirrel Brand Co.  
SAHR:MD

## COMMISSION'S EXHIBIT 126-L

Mr. R. J. Boid, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois.

Dear Mr. Boid:

As you doubtless realize, it is very hard for ourselves as manufacturers to adjust our prices on the basis of tremendous raw material increases. As I wrote you previously, [fol. 419] it is our policy to keep our prices down as much as possible and to pass on to our customers advances only when necessary. We have a very accurate cost system so that we know exactly what our merchandise costs us but of course as the months go on whatever raw materials we may have on hand show increased costs due to storage, etc.

Virginia peanuts have advanced approximately  $2\frac{1}{2}$ ¢ a pound; cashews have advanced from 8 to 10¢ a pound; and pecans have advanced approximately 2¢ a pound. On the basis of our costs it is necessary that we advance our prices slightly, so effective July 1st, it will be necessary for us to advance your No. 1 mixture to  $14\frac{1}{2}$ ¢ a pound, your No. 4 mixture to 15¢ a pound, and your salted Virginias to 12¢ a pound. This is an advance of one-half cent per pound on each item.

You can be assured that we wish to serve you well and that we will be absolutely fair in all of our prices to you as we have been in the past. Kindest personal regards.

Very truly yours, Squirrel Brand Co.

SAHR:MD

## COMMISSION'S EXHIBIT 126-N

(Letterhead of Automatic Canteen Company of America,  
Chicago)

July 24, 1941.

Squirrel Brand Co., 18-12 Boardman St., Cambridge, Mass-  
achusetts

Attention: Mr. S. A. H. Rich

Dear Mr. Rich:

Inasmuch as our distributors are beginning immediately to clean up on their inventories of summer numbers, we would like to look forward to withdrawing your Nut Caramel and Spanish Nut items from our summer list early in August.

[fol. 420] We will appreciate it if you will discontinue the manufacturing of these pieces for our use and advise us immediately just what quantities you have on hand prepared in the 100-count pack.

Very truly yours, R. J. Boid, Assistant Secretary  
Automatic Canteen Company of America.

RJBoid/mk

## COMMISSION'S EXHIBITS 126-R TO 126-S

August 19, 1941.

Mr. R. J. Boid, Automatic Canteen Co. of America, Mer-  
chandise Mart, Chicago, Illinois

Dear Mr. Boid:

As I have written you previously, we are doing our level best to serve you to the very best of our ability and in figuring the cost of the items which you use we are giving you the benefit of purchases that we may have made and we are not basing our prices on present market advances. Were we to do so the prices which we charge you would

have to be much above what we are charging you but there are certain increased costs that we cannot avoid such as cartons, liners and labor.

Very truly yours, Squirrel Brand Co.  
SAHR:MD

## [fol. 421] COMMISSION'S EXHIBIT 126-X

Mr. R. J. Boid, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois

Dear Mr. Boid:

I understood when I last called on you that our price of bars was out of line but we are so busy and so far behind that we have been unable to work out any different prices that we have today on bars. What I was referring to in my last letter was the fact that apparently Watertown at least is of the opinion that the Squirrel Brand Company has been dropped from all listings and that he cannot buy peanuts or any of the #2 mixtures from us.

Will you kindly advise me if he is mistaken in this respect.

Kindest personal regards,

Very truly yours, Squirrel Brand Co.  
Stephen A. H. Rich  
gf

## COMMISSION'S EXHIBIT 165-Z-6

February 17, 1942.

Mr. H. S. Hinds, Mr. J. H. Daugherty

Dear Mr. Hinds:

At our meeting in Boston last Saturday the matter of selling the Automatic Canteen was brought up by Mr.

Osgood. I stated at that time that the reason we were not listed with the Automatic Canteen is due to the fact that they have in the past insisted on buying 5¢ goods at \$2.00 a hundred and we have never been able to get our cost on a 5¢ bar down to a figure that would permit a price of this kind.

[fol. 422] We are today writing Mr. King asking him to call upon the home office in Chicago of the Automatic Canteen in an effort to determine whether or not the Canteen is now willing to pay more for 5¢ bars than they stated that they would pay in the past.

If anything of interest comes of this, we shall advise you.

Very truly yours,

JHD:RL

cc Mr. C. S. Osgood

Mr. J. R. Horgan

COMMISSION'S EXHIBIT 169-F

February 3, 1937.

Mr. Charles Haug, President, Mason, Au & Magenheimer Confy. Co., 22-28 Henry Street, Brooklyn, New York

Dear Mr. Haug:

I know you will be happy to learn that we have some rather favorable reports on our test on Black Crows. As a result we are now willing to put this item in our line in the uncartoned form only, and while I still think it will probably find its best sale in the east, I am perfectly willing to make it available for general distribution if you want to make your price the same whether f.o.b. Chicago or plant. Please let me have your answer on this by return mail.

Very truly yours, F. H. Anderson, Treasurer, Automatic Canteen Company of America.

FHAnderson:RAK

[fol. 423] COMMISSION'S EXHIBIT 169-G

Feb. 5th, 1937.

Mr. F. H. Anderson,  
c/o Automatic Canteen Corp. of America,  
Merchandise Mart,  
Chicago, Ill.

Dear Mr. Anderson:

Replying to your several letters, will go into the different matters in rotation:

Black Crows—It is very gratifying to hear that you have had favorable reports on Black Crows.

Regarding the sale in Chicago, we do not feel that we should change our present setup in regard to the freight but to give you an advantage, we are willing to concede part of the same on a basis of selling you these at \$1.95 per hundred. The fact that you will have no grief on these articles and the possibility of having a good summer article out of the same, we think you should look on this proposition with favor. Raw material costs are continually rising here and we need something like this to help the price up. We certainly would appreciate your cooperation in this matter.

COMMISSION'S EXHIBITS 169-Z-10 TO 169-Z-11

August 22nd, 1938.

Mr. R. J. Boid,  
c/o Automatic Canteen Corp. of America,  
Merchandise Mart,  
Chicago, Ill.

Dear Mr. Boid:

In reply to your letter of Aug. 9th, we have gone over the figures to determine whether we can meet your request regarding prepaying freight to the various branches. Your business with us has declined so much that we do not know whether it is the freight, or what to blame it on. At the

[fol. 424] prices we are selling these articles there is very little overage which would be materially reduced by a concession on freight. While it is true that this might be offset by a larger volume, the present indication is not along this line.

We know that there are many houses giving their goods away as applied to vending sales, because they charge it up to advertising, but we must first make a profit before we can do this and we are not in such a fortunate position as these others.

Yours very truly, Mason, Au & Magenheimer Conf.  
Mfg.

CFH:P

COMMISSION'S EXHIBITS 169-Z-12 TO 169-Z-13

August 24, 1938.

Mason, Au & Magenheimer Conf'y Co.,  
18-28 Henry Street,  
Brooklyn, New York.

Attention: Mr. C. F. Haug, President

Dear Mr. HAUG:

Your proposition of prepaying freight to all of our distributing points lying east of Chicago with a base billing price increased to \$2.10 per 100 bars does not appear to quite accomplish our purpose in making freight prepaid shipments to our distributing field due to the fact that we would immediately limit the distribution of Mason items included in this program to the territory lying east of Chicago. Inasmuch as you have been making your product available f.o.b. Brooklyn or Chicago with a base billing price of \$2.00 per 100 bars we would be better off to leave your product on the old basis unless you are in position to extend the freight prepaid program to cover the bulk of

our distributing branches which would require the extension of your offer at least to the Mississippi River. On the few branches lying west of the Mississippi we could arrange a program whereby the freight would be prepaid from your plant to the maximum point and the differential in the cost [fol. 425] of the freight between this maximum point and the destination would be shown as an extra charge on your billing for which we would reimburse you at each payment.

We can readily appreciate that there are many uncertain factors entering into a program of this kind and would like to gamble with you to the extent of increasing our billing price by 10¢ per 100 bars with the hopes that the 10¢ increase will more than offset the actual freight charges on shipments made. After a 60 to 90 day period, should we find that our calculations have been misdirected, we would then be glad to sit down with you and check actual experience as a basis for revision of figures.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid:ES

COMMISSION'S EXHIBITS 169-Z-14 TO 169-Z-15

August 29, 1938.

Mason, Au. & Magenheimer Conf'y Co.,  
18-28 Henry St.,  
Brooklyn, New York.

Attention: Mr. C. F. Haug, President

GENTLEMEN:

We are glad to have your cooperation on our freight prepaid program and will list all of your bars at \$2.10 with freight prepaid irrespective of where the shipments may go. We are not quite clear as to whether or not you desire to have this program cover our distributing branches lo-

cated west of the Mississippi River as follows: two in Oklahoma—two in Kansas—one in Nebraska—one in Colorado—one in Utah—two in Washington—one in Oregon and three in California. All of these branches are small in comparison with our branches located in the middle western [fol. 426] and eastern territories and we naturally should like to make this program all inclusive if agreeable with you.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid:

ES

Enc.

COMMISSION'S EXHIBIT 169-Z-21

August 26, 1938.

Mr. R. J. Boid,  
c/o Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

Dear Mr. Boid:

Your letter of August 24th has been received, and we will accept your proposition as outlined in the last paragraph—that is that on a sixty day basis, we will bill one candies at \$2.10, we paying the freight. Let us see how this works out and when the sixty days are up we will get together and compare notes.

This will mean that all goods to you, whether shipped in New York City, your Eastern distributors, Chicago, and western points, all will be billed the same, at \$2.10 per carton.

In accepting this proposition, we would however, just like to have one qualifying point and that is in regard to any goods which you may order for Pacific Coast distributors. To ship across country by rail is going to be exces-

sively expensive for us. We have no idea as to what the volume might be. Would such goods go water route via Canal?

Yours very truly, Mason, Au & Magenheimer Conf.  
Mfg. Co.

WS:P

[fol. 427] COMMISSION'S EXHIBITS 169-Z-42 TO 169-Z-43

(Letterhead of Automatic Canteen Company of America,  
Chicago)

December 27, 1938

Mason, Au & Magenheimer Confectionery Co.,  
12-28 Henry Street,  
Brooklyn, New York.

Attention: Mr. C. F. Haug

Dear Mr. Haug:

Due to a certain amount of confusion with our distributors since the release of your bars on a freight prepaid basis, and due to the necessity of billing you back for all shipments that move to the west coast via Candy Association Pool Car, we are desirous of making some change in the method of shipment and the billing of our distributors, but before putting this change into effect we want to take the matter up with you and see if you would be good enough to check your average per case freight cost on shipments made to us during the fall months on a freight prepaid basis. After determining this cost factor, would you be good enough to quote us on a base price f. o. b. Brooklyn for all candy bars to be withdrawn from your plant.

If present plans are developed in the light of a careful study we have given to the prepaying of freight to our distributing branches and its relation to volume insofar as a given manufacturer's product is concerned, we would like to rearrange our purchasing program with you and ask

that you bill us on an f. o. b. plant basis for all bars withdrawn from you, making all shipments to our distributors on a freight collect basis, presuming of course that the base price would be such as to permit us to issue to our distributors a full freight credit for all your candy here ordered by them.

We have been experimenting in our Chicago area for the past month with this method of making shipments rather than have the manufacturer prepay the freight, and have found it much more acceptable to our distributors as well as promoting extra volume for the manufacturers who are cooperating on this basis by giving the small distributor an [fol: 428] opportunity to use a manufacturer's complete line of candy bars without the necessity of overstocking due to the requirements of minimum weight orders. Our billing department has been set up on a basis of taking each manufacturer's candy items, figuring an area rate credit per case, and allowing that credit at the same time the goods are billed to the distributing branch.

Will you therefore be good enough to go over your figures and determine just what price you could quote us on all your bars f. o. b. Brooklyn, N. Y., all shipments to be made freight collect.

Very truly yours, R. J. Boid, Assistant Secretary.

RJBoid/TWW

COMMISSION'S EXHIBITS 169-Z-52 TO 169-Z-53

Jan. 3rd, 1939.

Mr. R. J. Boid,  
c/o Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

DEAR MR. BOID:

Replying to your letter of December 27th in regard to changing our prices to an f.o.b. New York arrangement, we have been checking up figures and costs over an eleven months period in 1938, from January to November, inclusive.

There are two very important things which it is necessary for us to consider. One is that approximately half the business you gave us last year, came from your Eastern distributors, in New York, New England, Pennsylvania, New Jersey, Maryland, D. C., Virginia and North Carolina, the other half coming from Chicago, Michigan, Ohio and points farther west. The other is that we are in the midst of a packaging change of the candies which you buy from us, which will cost us more for the goods, and it is going to increase their weight so that freight will be higher. On our new package we figure that the weight of a carton will [fol. 429] be about 20 lbs, and that freight to points in the East will average 12¢ per carton.

Taking everything into consideration, we offer you a \$2.02 per carton price, f.o.b. New York.

Our freight costs in the East have been about 5% and on a \$2.02 price, the cost per carton to you would be about on an equitable basis with our present arrangement. In the western area we have been averaging about 9% for freight and at a \$2.02 price, the delivered cost to you would be between \$2.18 and \$2.20 per carton, or approximately 19¢ per carton more than you are paying under the present arrangement.

All this would tend to show that in New York City, at \$2.02 per carton f.o.b. New York, would be buying at 8¢ per carton less than they are now. In Connecticut, Massachusetts, Rhode Island, etc., you would be paying about the same as at present and as against that, you in the west would be paying about 10¢ per carton more for freight than at present price \$2.10 delivered.

While it seems to penalize the west, we think it favors the east to such an extent as to make it more than equitable. Then also against any unfavorable factors which may develop, there will be the much larger package, with its novel, attractive features, all of which should make for greater sales possibilities. If the goods were small, no matter what we quoted, it would not mean anything. The new larger package will bring more business to us all. It is our opinion that the success of the vending machine industry depends on giving the public commensurate values to those obtainable in independent outlets.

We have tried to answer your letter to cover all the points which you brought up and shall await your comments and opinion.

Yours very truly, Mason, Au & Magenheimer Conf.  
Mfg. Co.

WS:P

[fol.430] COMMISSION'S EXHIBITS 169-Z-54 TO 169-Z-55

January 11, 1939

Mason, Au & Magenheimer Confectionery Co.  
12-28 Henry Street  
Brooklyn, New York

Attention: Mr. Wallace Schmidt

DEAR MR. SCHMIDT:

Perhaps the answer to the problem of the moment is a differential in price for your respective bars, rather than laying them all across the board at one price. Frankly, we would like to continue to leave all of the Mason items available on a full freight delivery basis to all of our distributors, and we are willing to gamble on the freight charges, which naturally are governed by territorial distributorships; provided the f. o. b. plant price and f. o. b. Chicago price give us a margin in which to pay this freight. As you point out in your letter, the prepaying of freight on Mason items this fall for our entire distributorship has run a little in excess of the 10¢ a case we added to the billing price in September. This means that the manufacturer has been carrying that differential in cost and we, the Automatic Canteen Company, have been carrying the 10¢ a case cost. We are still willing to carry the 10¢ per case cost and make Mason's items available to all of our distributors freight prepaid, but can continue to do so only on the basis that your f. o. b. Brooklyn plant and f. o. b. Chicago prices grant us this differential.

Our records of shipment during the fall months have indicated very clearly that the delivery of bars freight prepaid to our distributors has increased the sale of those bars over the bars listed on an f.o.b. plant basis, and we would be very much opposed to changing Mason's items to a free delivery basis for eastern distributors only and forcing our western distributors to use Mason's items on an f.o.b. plant or f.o.b. Chicago basis whereby they would be penalized the [fol. 431] freight charges for every bar that they used, over those distributors who received the items on a free delivery basis.

At the present time, over 50% of our candy line shipped to our distributors is delivered free to them. As a result, the distributors are favoring the manufacturers who are working with us on this program by ordering those bars which tend to reduce their product cost.

To summarize, we would like to have you carefully consider a base price billing; perhaps a differential for bars, one price being an f. o. b. Brooklyn price, and the other being an f. o. b. Chicago price. We will then equalize from these two base prices the freight charges by crediting our distributors' invoices at the time the goods are billed, with the proportion of freight that is due to each of the distributors depending upon the point of shipment.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid/TWW

[fol. 432] COMMISSION'S EXHIBIT 169-Z-56.

January 17, 1939.

Mr. R. J. Boid,  
c/o Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

DEAR MR. BOID:

Your letter has been received and we have again checked into figures very carefully. As you ask for f. o. b. prices, we quote you as follows:

Any of our items packed 100 count to the carton, \$1.95 per carton, f. o. b. New York; or if you wish an f. o. b. New York and f. o. b. Chicago price, we quote you \$2.02 per carton.

On the first proposal of \$1.95 per carton f. o. b. New York, it would mean that all shipments to all points except in the New York radius, where we will make deliveries without charge, would be made freight collect.

On the second proposal of \$2.02 per carton f. o. b. New York and Chicago, we would make deliveries without charge to your distributors in the New York City radius and we would pay full freight charges on shipments made to your Chicago warehouse. To all other distributors in different points, shipments would be made freight collect.

Your very truly, Mason Au & Magenheimer Conf.  
Mfg. Co.

WS:P

[fol. 433] COMMISSION'S EXHIBIT 169-Z-57

(Letterhead of Automatic Canteen Company of America,  
Chicago.)

January 26, 1939

Mason, Au & Magenheimer Confectionery Mfg. Co.  
18-28 Henry Street  
Brooklyn, New York

Attention: Mr. Wallace Schmidt

DEAR MR. SCHMIDT:

re f. o. b. Plant purchase vs. freight prepaid  
program.

A blanket price of \$2.02 f. o. b. Brooklyn or Chicago on all of your items would mean that it would be impossible for us to continue to make Mason items available on a free delivery basis (i. e., full freight credit on our distributors' invoices). However, in the interest of continued volume and, no doubt, increased volume due to the general build-up of our business this time of the year, we are extremely anxious to continue to make these items available on a free delivery basis to all of our branches, and in order to do so would need a happy medium price somewhere between your Brooklyn prices and that quoted as the minimum Chicago base.

We believe that the average distribution of your bars east and west will show a maximum freight cost not to exceed 12¢ per case. When we say this, we're thinking in terms of the fact that the heaviest distribution is to eastern distributors.

A price permitting us to leave a manufacturer's items on a free delivery basis to all of our distributors naturally proves an incentive to the continued use of that manufacturer's items, and an incentive to expand items that might be available for use in our line.

We await your further analysis of this before making announcements to the field.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

R.J.Boid/TWW

[fol. 434] COMMISSION'S EXHIBIT 169-Z-58

January 30th, 1939

Mr. R. J. Boid,  
c/o Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

DEAR MR. BOID:

Thank you very much for your letter of the 26th inst.

We have been checking into costs and freights so much in order to arrive at some price which would be satisfactory to you and also satisfactory to us, that we would now like to have you tell us what you think the price should be. We do not know exactly how you figure prices for your distributors—for instance how you will handle this freight to give them goods on a free delivery basis. Perhaps you could suggest a price showing us just how it would be attractive to your distributors so that they will show more interest in our goods.

As soon as we hear from you in regard to this, we are quite sure we can give you an immediate answer.

With best wishes, we are

Yours very truly, Mason Au & Magenheimer Conf.  
Mfg. Co.

WS:P

[fol. 435] COMMISSION'S EXHIBIT 169-Z-59

(Letterhead of Automatic Canteen Company of America,  
Chicago)

February 2, 1939

Mr. Wallace Schmidt, Mason, Au & Magenheimer Conf'y  
Co., 18-28 Henry St., Brooklyn, New York.

DEAR MR. SCHMIDT:

Our recent correspondence would indicate that we appear to be getting nowhere fast. That is one of the difficulties in trying to handle a situation as involved as the distribution of any particular bar and especially when the question of freight costs enters into the picture.

Since you have thrown the burden of quoting a base price right back on our shoulders, we will make the following proposition: If you can quote us a price of \$1.95 per 100 f.o.b. Brooklyn and \$2.00 f.o.b. Chicago, we will assume the entire freight burden. We mean by this that on all goods shipped direct to the distributing points lying east of Chicago the billing will be \$1.95 while on goods moved through our Chicago warehouse the billing will be \$2.00, with you assuming the freight to Chicago. Under this program all goods will be shipped to our distributors on a freight collect basis and proper credit will be issued the individual distributors' account for the freight cost involved.

We will be very glad to hear from you as soon as you have had an opportunity to go over this suggested program.

Yours very truly, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid :ES

[fol. 436]. COMMISSION'S EXHIBIT 169-Z-60

February 7th, 1939

Mr. R. J. Boid, c/o Automatic Canteen Co. of America,  
Merchandise Mart, Chicago, Ill.

DEAR MR. BOID:

Your letter of February 2nd has been received and Mr. Haug and I have been going over it, looking for a clue which would give us the solution of a correct price for you and for us.

In your letter of February 2nd, you really have combined the propositions which we made to you in our letter of January 17th except that you have suggested a \$2.00 f. o. b. Chicago price whereas we offered a \$2.02 f. o. b. Chicago price. We are however, getting so close together, that we will give a point if you will and we will therefore agree to combine the two arrangements offered in our January 17th letter. On this basis, the price per carton would be \$1.95 f. o. b. New York and \$2.02 f. o. b. Chicago. This would give us 2¢ a carton more than your suggested price on the western business.

Actually these are better prices than we have ever given you, notwithstanding the fact that two of our items will be quite a bit heavier in weight.

At these prices, we would also like to ask that you would do for us whatever you could, to give us more business on our Black Crows.

With best wishes, we are

Yours very truly, Mason Au & Magenheimer Conf.  
Mfg. Co.

WS:P

\* \* \* \* \*

[fol. 437] COMMISSION EXHIBIT 169-Z-71

April 28, 1939

Mr. R. J. Boid, c/o Automatic Canteen Co. of A., Merchandise Mart, Chicago, Ill.

DEAR MR. BOID:

Your letter of the 14th inst. stating your World's Fair proposition has been received. Mr. Haug has been hard to reach due to our other conditions and I was unable to write you before this as to our decision.

With all the other factors facing us just now we are sorry that it would be impossible for us to grant any concessions for advertising. We appreciate that you have made us a wonderful offer and we would like very much to go along with you on it but we really have no choice in the matter.

Many thanks, however, for making us the offer and I am sure you will appreciate our position in the matter, we are,

Very truly yours, Mason Au & Magenheimer Conf.  
Mfg. Co. ————— Sales Manager.

WS P

## COMMISSION'S EXHIBITS 169-Z-72 TO 169-Z-73.

April 19th, 1939.

DEAR MR. BOID:

Supplementing my letter of yesterday, it probably requires just a little further information so that you can understand better what our position is.

To be represented at the Fair with our candy in your machines and also on any of the stands which will sell candy, is naturally something in which we or anyone else would take great pride. It is necessary however for us to consider the cost standpoint, and I thought I should write you a little more personally than in a business way, to let [fol. 438] you know the offers made to manufacturers to get their candies on display at the Fair.

For instance, Faber Co. & Gregg have a chain of candy stands which are supposed to be about thirty-five or so in number and they offered manufacturers full spaces or half spaces at a price, and then they would in turn handle a manufacturer's goods at regular jobber's prices. For instance, our price to candy wholesalers or jobbers, for boxes of 24 count is 64¢ and if we had contracted for a display with Faber, Coe & Gregg, they would have paid us 64¢ for our 24 count Peaks, Mints and Crows. I am mentioning this so that you will understand when I state that enough sale would have been anticipated to at least offset the cost of the contracted space.

Our price to you on our candies which you use is \$1.95 for 100 count cases and this figured out in 24 count boxes brings the price down to 46-4/5¢ per box, which you can see is a decidedly lower price than we get from our regular jobbing trade. Our price to you is so low that as it stands, it is just about at the break-even point, but we like the business on account of the distribution and the prestige that we get from such business from you. On top of that however, we could not stand any additional expense, which is the point I am trying to bring out and which I thought would

require a little more definite information than I gave to you in my letter of yesterday.

Yours very truly,

CWS:P

COMMISSION'S EXHIBITS 169-Z-77 TO 169-Z-78

May 8th, 1939

Mr. R. J. Boid, c/o Automatic Canteen Corp. of America,  
Merchandise Mart, Chicago, Ill.

DEAR MR. BOID:

The matter of prestige is also important, and we have given it a lot of thought. We would like to have our Peaks, Mints and Black Crows at the Fair, but for the reasons given to you, the Faber, Coe & Gregg proposition did not [fol. 439] interest us, even though the anticipated sale might have produced a profit for us. For your business, the prestige of Canteens at the Fair, we consider wonderful even at the high cost to you. For us the cost is too great.

So that it all again comes down to what we wrote you in our first letter. The prices on our candies to you are low because we have already figured that distribution in your Canteens gives us sales, advertising and prestige. We just cannot go any further. If we could do so, I am sure you know we would be with you.

Yours very truly, Mason Au & Magenheimer Conf.  
Mfg. Co.

WS:P

## COMMISSION'S EXHIBIT 169-Z-94

February 26th, 1943

Automatic Canteen Co. of America, 1430 Merchandise Mart,  
Chicago, Ill.

Attention: Mr. R. J. Boid

GENTLEMEN:

As you know, we have sold you for many years at a close price, which took into account economy in your method of doing business, some of which no longer exist under war conditions, the increased cost of ingredients and labor, combined with our having to absorb our fixed price on an increasing volume of business, limited by sugar and chocolate quota, making it impossible for us to do business profitably at previous prices.

Very truly yours, Mason Au & Mogenheimer Conf.  
Mfg. Co.

CFH:P

[fol. 440] COMMISSION'S EXHIBITS 175-J AND 175-K

September 26, 1941

Automatic Canteen Company of America, Merchandise Mart, Chicago, Illinois.

Attention: Mr. R. J. Boid

GENTLEMEN:

Please understand that it is not our intention, nor desire, to be arbitrary or dictatorial and our discount policy is one of necessity rather than inclination. We cannot afford to make the paying plan you request general, and think we have given you logical reasons why exceptions cannot be made.

On several occasions, without any advance notice, Government auditors have carefully examined our books, and

one of the things they looked for diligently was to see if we were allowing any special terms or prices. It was a very satisfactory feeling to know that we had nothing to conceal.

In conclusion we repeat that we value your patronage and would like to retain it, but as you have delivered to us what is virtually an ultimatum we are left with no alternative but to return your remittance and accept your offer to work out an adjustment of the discount to which you are not entitled. It amounts to \$8.34. What we are asking of you is not unreasonable and we have not yet abandoned the hope that you will find it possible to observe our discounting terms.

Yours very truly, National Licorice Company,  
\_\_\_\_\_, President.

DDS:MH

Check

cc—SZHoffman

[fol. 441] COMMISSION'S EXHIBITS 175-L TO 175-M

September 17, 1941

Automatic Canteen Company of America  
Merchandise Mart  
Chicago, Illinois

Attention: Mr. R. J. Boid

Gentlemen:

Your friendly letter of September 15 has been carefully read and considered by the undersigned.

We value your account highly and it is our desire to cooperate with you in every way consistent with our business policy but we regrettably cannot grant the discount arrangement you request.

Most of the large chains, such as Woolworth, Kresge, Liggett, United Cigar Stores, etc. with complicated book-keeping systems have applied to us for special terms. Were we to extend such a privilege to one we could not, under the Robinson-Patman Act, refuse the others, to say nothing

of the unfairness of discriminating. To make the practice general would mean a further upward revision of our selling prices.

Although we are increasing the price of twenty-four count NIBS one cent a box on September 22, as you were informed in our letter of September 12 we are maintaining the price of NIBS in the one hundred count despite the fact that our manufacturing costs have advanced considerably. The 2% cash discount represents most of our profit in this package.

While it is true that under your system of payments some invoices are taken care of in less than fifteen days others, as in the case of most of the charges covered by your remittance of August 29 were considerably beyond the fifteen day period and discount cannot be averaged, as the people from whom we buy will not permit us to follow that plan when paying for our purchases.

Without an exception the above mentioned concerns after having had our position explained to them have managed to arrange to make payments within fifteen days in all instances. We sincerely trust that you will find it possible to do likewise. If it cannot be done you always have the option of paying gross at the expiration of thirty days.

[fol. 442] Under the circumstances we have no alternative but to again return your check of August 29 and would appreciate it if you will favor us with a corrected one for \$515.27.

It goes without saying that we want you to retain the listing of our Oriental Licorice NIBS but to avoid any future misunderstanding we would like to have the question of our terms clearly defined before your new lists go forward.

We entertain the hope you will write us that our account can be placed on a straight fifteen day period.

Yours very truly, National Licorice Company,  
\_\_\_\_\_, President.

DDS:TP

Check

cc—Hoffman

## COMMISSION'S EXHIBIT 175-O

(Letterhead of Automatic Canteen Company of America,  
Chicago)

September 29, 1941

National Licorice Company  
Bridge and John Streets  
Brooklyn, New York

Attention: Mr. D. D. Sanford

Dear Mr. Sanford:

Inasmuch as the requirements placed by your company would necessitate the special handling of your invoices, we are immediately discontinuing NIBS from our general lists. We will appreciate it if you will cancel all orders sent in to you by our distributors, and return the original copy of the unfilled order direct to our Merchandise Mart office.

We are asking our Accounting Department to draw your company a check for the \$8.34 covering the discount deducted from the invoices included in our check #12071.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid/mr

[fol. 443] COMMISSION'S EXHIBIT 175-Z-10

September 11, 1944

Automatic Canteen Co. of America  
1438 Merchandise Mart  
Chicago 54, Illinois

Notice

Attention: Mr. R. J. Boid

Gentlemen:

It is regretfully necessary for us to return herewith your check tendered to cover our invoice of August 17, 1944 as your deduction of 2% cash discount is not in order. The

cash discount we offer is not figured in our selling prices and to be earned remittances must be Mailed within 15 days of invoice date at the very outside. Yours was not sent within that period. A corrected check for \$65.34 will be appreciated, or if you prefer to use this one be kind enough to accompany it with additional check for \$1.31.

National Licorice Company.

LS

check

COMMISSION'S EXHIBIT C-190-A

December 5, 1941

Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

Attn: Mr. R. J. Boyd, Assistant Secretary

Gentlemen:

Owing to greatly increased prices of raw materials and increased costs of other items incidental to the manufacture of our products, effective January 2nd, 1942, the price on our 5¢ Goods, packed 100 to the carton, will be \$2.30 per [fol. 444] carton, F.O.B. Suffolk and F.O.B. Chicago, subject to the regular 2% cash fifteen days.

Owing to relatively higher costs on the West Coast, the price on 5¢ Goods that they manufacture out there will be \$2.50 per carton of 100 packages, full freight allowed.

As you may know, our regular price for this same merchandise that you are buying is \$2.50 per carton of 100 packages, full freight allowed.

Considering the freight saving in offering you an F.O.B. Chicago, an F.O.B. Suffolk price; and taking into consideration a saving for selling expense, are the principal reasons why we can offer you the price of \$2.30, as above outlined.

Very truly yours, Planters Nut & Chocolate Co.,  
Secretary.

FAE:A

COMMISSION'S EXHIBITS C-190-B and C-190-C  
(Letterhead of Automatic Canteen Company of America,  
Chicago)

December 11, 1941

Planters Nut & Chocolate Company  
Wilkes-Barre  
Pennsylvania

Attention: Mr. F. A. English

Dear Mr. English:

We can readily appreciate the condition that all organizations find themselves in today with the constantly increasing cost of base materials, and do not feel that we are in a great deal different position than all other organizations in the distributing end of industry.

Your letter of December 5 quoting new prices on your products is in line with many discussions we have had during the last few weeks with candy manufacturers. However, the amount of the increase designated in your letter is rather difficult to accept in one lump sum. We mean by this that due to our contractual arrangements with our distributing organization a drastic increase in cost of goods necessitates a complete change of those fixed contracts and such a change cannot be accomplished in the course of a short period of time.

We set in motion a few weeks ago with our distributing field the mechanics for such a change. However, the actual application of the change will not begin to effect distributors costs until some time after the first of the year.

We have discussed this subject very frankly with many of our leading suppliers and they are adopting a program to overcome the high cost of manufacture by two approaches:

1. Reduction in the size of 5¢ bars.
2. Gradual increases in the billing of our account.

If you find that the quotations contained in your letter are the best that can be offered at this time we have no other option than to discontinue your product at least until such time as we can begin to distribute this cost with the field

We will appreciate hearing from you on this. With  
kindest regards,

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJ Boid:mr

[fol. 446] COMMISSION'S EXHIBIT C-190-D

December 26, 1941

Automatic Canteen Company of America,  
Merchandise Mart,  
Chicago, Ill.

Attention: Mr. R. J. Boid, Ass't Secretary

Gentlemen:

We have given much thought to your letter of December 11th.

After going over our figures again and comparing them with present day costs of raw materials, we find it impossible to alter the schedule given you in our letter of December 5th.

As a matter of fact, right at this minute, we are figuring new higher prices for the general trade to become effective on January 2nd, 1942.

The schedule quoted you in our letter of December 5th, will be guaranteed for a period of sixty days, which means through to February 28th, 1942.

Very truly yours, Planters Nut & Chocolate Co.,  
\_\_\_\_\_, Secretary.

FAE:A

[fol. 447] COMMISSION'S EXHIBITS C-190-G TO C-190-H

February 5, 1942.

Automatic Canteen Company of America, Merchandise Mart, Chicago, Ill.

Attention: Mr. R. J. Boid, Ass't Secretary

GENTLEMEN:

Answering your letter of January 30th, first, we want to apologize for the infraction of your rules committed by our order clerk who was not fully conversant with the arrangement we have with you.

The writer has been very careful seeing to it that your distributors, at no time, have been informed of our prices, terms, etc., agreed upon with your headquarters. Instructions to this effect have gone out repeatedly but in some unknown manner our order clerk lost track of these instructions and inadvertently mentioned the price in his letter to your Baltimore agency.

We assure you that we have again explained the matter to our various order and billing clerks that we feel safe in promising you that this will not occur again.

With regards to the copy of your letter written to our San Francisco Factory, it is most evident that our post-card "Price Change Notice" dated December 29th, 1941, one of which is attached, mailed to your Company failed to reach your desk.

You will note from this "Price Change Notice" that the price on our 100 count 5¢ Goods advanced to \$2.60 per carton of 100-5¢ packages on December 29th.

Inasmuch as the arrangement we have with you on orders being shipped from our San Francisco Factory are handled on the above basis, quite naturally, they assumed that the \$2.60 per carton price, as invoiced, was in order.

We are going to ask our San Francisco Office to make the necessary adjustments on the invoices since December 29th, invoiced at the higher price, but we would like to have you put into effect promptly the new price of \$2.60

per carton, delivered, as it applies to the orders shipped to your West Coast distributors.

As long as we are discussing prices in this letter, we are going to take this opportunity to advise that owing to [fol. 448] the necessity of advancing the general list 10¢ per carton for the 100 count pack, owing to continued higher costs of Peanuts and other raw materials, the new price on our present basis, to your good Company, will be \$2.40, F. O. B. Suffolk, or F. O. B. Chicago.

If you will refer back to our letter of December 26th, 1941, you will find that therein we quoted the present \$2.30 price, F. O. B. Suffolk, or F. O. B. Chicago, guaranteed to February 28th, 1942.

We will protect this quotation to this date but commencing with orders reaching us on March 1st, 1942, we will use the new price of \$2.40.

As you have gathered from the foregoing, you have received an advantage of 10¢ per case all through January and February inclusive as we advanced the general list to the regular trade on December 29th, 1941.

At this time, might we bring to your attention that we feel both you, and ourselves, would rest more easily if we got back to the regular basis of \$2.60 per carton, full freight allowed.

As we go over our figures again today, considering the various distances between your many distributing agencies from Suffolk, and from Chicago, the two shipping depots, we really feel that from an economical standpoint you would be better off by paying us \$2.60, with full freight allowed, than the new price of \$2.40 per case, F. O. B. Chicago, or F. O. B. Suffolk.

Owing to recent Federal Trade Commission citations, and rulings, etc., we could both save ourselves a great deal of trouble by getting back to this delivered basis which is the basis applicable to all.

As explained above, we feel confident that if you will give this delivered schedule a fair trial, over a fair period of time, you will find, as we have found, that you are a little bit better off paying the \$2.60, leaving us assuming

all of the freight, than the new price of \$2.40, you paying the freight from Suffolk out, as well as from Chicago out.

Very truly yours, Planters Nut & Chocolate Co., Secretary.

FAE:A

Encl. 1.

P.S. Please be sure to arrange for the \$2.60 price, full freight allowed, on the West Coast orders effective immediately.

[fol. 449]. COMMISSION'S EXHIBIT C-190-I

(Letterhead of Automatic Canteen Company of America,  
Chicago)

February 10, 1942.

Mr. F. A. English, Planters Nut & Chocolate Company,  
Wilkes-Barre, Pennsylvania

DEAR MR. ENGLISH:

We have reviewed the text of your letter of February 5 and are changing our records to show the effect of the price changes quoted in your letter.

Due to the prices that you find it necessary to quote we are compelled to make some shift in the distribution of your bars. We certainly cannot leave your item free for our distributors to order at a \$2.60 billing on the Pacific Coast.

With kindest regards,

Very truly yours, R. J. Boid, Assistant Secretary  
Automatic Canteen Company of America.

RJ Boid-mr

[fol. 450] COMMISSION'S EXHIBITS 203-A TO 203-B

March 16, 1943.

Mr. R. J. Boid, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois

DEAR MR. BOID:

Our sales to the Automatic Canteen Co. of America for the same sized merchandise prior to the date of the fire have always been made at less than our ceiling price. To substantiate this statement we sold certain accounts identical packages as those supplied to your Company at \$2.80 per 100 packages, which was therefore our ceiling price.

At all times we have made sales to your Company at substantially lower prices than we made to other Companies and also at substantially lower prices than our ceiling price.

Yours very truly, Town Talk Incorporated, President.

EHH:P

COMMISSION'S EXHIBIT 203-C

July 7, 1943.

Mr. R. J. Boid, Automatic Canteen Co. of America, Merchandise Mart, Chicago, Illinois

DEAR MR. BOID:

Continuing our letter to you dated July 1st relative to certain changes in price on the following items, we state as follows:

1. Cream-filled Sandwiches are a new item and are wrapped on the Wrap-O-Matic Machine which is a different wrapping than we have ever used before. Our ceiling price on this item is \$2.80 per hundred packages.  
[fol. 451] 2. Shortbreads, designated Old Fashioned Cookies, are also wrapped on the Wrap-O-Matic Machine

and are a new package. The increase in price to you of 3¢ per hundred packages is in order. Our ceiling price on this item is \$2.80 per hundred packages.

3. Peanut-buttered Cheese Sandwiches, 4¢ to the package. Previously we billed you at \$2.45 per hundred and the new billing price is to be \$2.48 per hundred. Our ceiling price on this item is \$2.80 per hundred packages.

You will note from the above that all of these are under our ceiling price and represent substantial reductions to you from our established ceiling prices.

Very truly yours, Town Talk Incorporated, President.

EHH:AK

COMMISSION'S EXHIBIT C-190-M

April 27, 1943.

Automatic Canteen Company of America, Merchandise Mart, Chicago, Ill.

Attention: Mr. R. J. Boyd, Ass't Secretary.

GENTLEMEN:

When we negotiated the present arrangement with you, which was submitted in our telegram of May 26, 1942, confirmed by your letter of May 27, 1942, we passed along to you the difference in price comparable with the actual freight saving of the F. O. B. Suffolk arrangement against our delivered basis to our regular jobbers, distributors, etc.

At that time the freight involved figured 7%. Our 120-count 5¢ goods is priced at \$3.12 per carton delivered. After deducting the 7% freight we arrived at the \$2.90 F. O. B. Suffolk price.

Since that time there has been a reduction in sizes, weights, etc. permitted by the OPA. We have just completed figuring your account for January, February and March of 1943 to see how the 7% compared with the actual freight. This statement is attached; which shows that the actual freight has now been reduced to 5.03%.

[fol. 452] Therefore, if both you and ourselves are to keep our skirts clean and keep within the dictates of present laws and regulations, it is imperative that we readjust our price structure in accordance with the above findings.

Therefore, effective May 1, 1943, it will be necessary for us to change our price to \$2.96 per carton, for the 120 count pack, F. O. B. Suffolk, Virginia, on the same basis as at present.

If you will take the \$3.12 delivered price for this 120 count package and deduct 5%, you will arrive at a figure of \$2.964 per carton. We are dropping the four-tenths of one cent, being less than a half-cent, arriving at the price of \$2.96.

We trust that you can follow us and that you will agree with us that for all good reasons this adjustment should be made, and if agreeable to you our invoices dated from May 1st will be priced accordingly.

If you prefer that we place you on a delivered freight basis, we will be pleased to use the delivered price of \$3.12 per carton, we to pay all of the freight.

Our regular terms of 2% cash 15 days or net 30 apply.  
Thanking you for past and continued favors, we remain

Very truly yours, Planters Nut & Chocolate Co.,  
—, Secretary.

FAE:MLP

Encel. 1

CC: Mr. E. Beneini,

DEAR BNX:

This is self-explanatory. To keep within the Patman Law, and every other law and regulation governing business today, and to keep both Automatic Canteen and this Company out of trouble, it is necessary that we revise our price so as to reflect the actual freight saving.

As you will note on the attached statement, the actual freight cost for January, February and March, 1943 was 5.63%. We are charging them accordingly, which, in our opinion, keeps our price within any and all regulations. We suggest that you do not call on Mr. Boid until we

hear from him and unless we believe it necessary to make a personal call. Kind regards.

F. A. E.

[fol. 453] COMMISSION'S EXHIBIT 203-F

(Letterhead of Automatic Canteen Company of America,  
Chicago)

June 5, 1943.

Town Talk, Inc.,  
Phoenixville, Pa.

Attention: Mr. E. H. Hubbell

Dear Mr. HUBBELL:

We have the samples of Cream-filled Sandwiches and your letter of May 31.

We do not see how it will be possible for us to release either of these items in their present form. The 4-package round cookie at \$2.70 is prohibitive. However, the item would be acceptable if the billing were within proper range. The 2-package square cookie does not look the value.

We feel we would be much better off to withhold releasing goods of this kind—at least until competitive pieces have changed a great deal more than they have up to this time.

We hope that when you get the new wrapping machines they will serve to reduce your packing costs enough to make it possible to include some more items from your plant.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid-mr

[fol. 454] COMMISSION'S EXHIBIT 209-V

December 17, 1936.

Automatic Canteen Company of America,  
Merchandise Mart,  
Chicago, Illinois.

Attention:—Mr. F. H. Anderson

GENTLEMEN:—

Your letter of December 11th was received but in the turmoil existing on eleventh hour Christmas Business we were unable to get off a prompt reply to you regarding Henry's Fruit and Nut Chews, delivered to Chicago. You have mentioned in your letter that you might be able to handle Henry's Fruit and Nut Chews in the Chicago territory at \$1.95 per hundred, F. O. B. Chicago.

You are no doubt aware of the rapid changes that are occurring in the candy business at this time, particularly the increased costs of chocolate and nuts. In addition to that we are having considerable legislation in Pennsylvania regarding hours and wages for the workers in factories. The result is that we are unable to know what to expect in the next few months.

Regardless of all these, we know that we must be in line with our reputable competitors and we intend to give as much value as possible to our customers, at a price in line with their policy of merchandising.

We understand that you buy standard bars only, the same size as are sold thru jobbers. Therefore, our figures must be based on regular merchandise and service at all times. In order to do this we cannot name a better price than \$2.03 per carton of 100 bars Henry's Fruit & Nut Chews, F. O. B. Chicago, in quantities of approximately five hundred cartons.

This is all that we can do at the present time and hope that you will see fit to place our bars in the Chicago territory. We thank you for the interest you have shown in

Henry's Fruit and Nut Chews and will await your advice regarding same.

Very truly yours, Dewitt P. Henry Company.  
DPH/R

[fol. 455] COMMISSION'S EXHIBITS C-219-E TO C-219-F

March 10, 1938.

Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

Attention: Mr. R. J. Boid

Dear Mr. Boid:

I note your comment in your letter of February 23rd regarding the possibility of equalizing freight on your mid-western and western territory, to enable you to make our bars available in these territories. Our price to you, as you know, is figured on a F. O. B. Philadelphia basis, with no provision for freight allowance. We have gone into this matter very thoroughly, however, and have decided to give you a 70¢ Per Cwt. Freight Allowance on all shipments to your western and mid-western points; in consideration of your making our merchandise available to these outlets.

Very truly yours, D. Goldenberg, Inc.

Arthur Echil/sa

## COMMISSION'S EXHIBIT 236-D

February 25, 1942.

Mr. R. J. Boid,  
 Automatic Canteen Company,  
 Merchandise Mart,  
 Chicago, Ill.

Dear Mr. BOID:

Since recently having the pleasure of calling upon you, we have been working on the plan which you outlined to the writer, with the hope that we would eventually be able to bring our bars into your price range and we will have definite information on this set-up within the next few days. [fol. 456] As you know, the cocoanut market has gone quite high and as two of the pieces which you have been using contain cocoanut, we have been doing a little experimenting on these bars with the hope that they could be adjusted somewhat to meet your requirements.

Your kindness in helping us to work into the picture is very much appreciated and you can rest assured that we will bend over backwards to cooperate with you, and give you the kind of merchandise you want at a price to fit your set-up.

With warmest regards, I am

Most cordially yours, C. P. Lang.

CPL/LR

## COMMISSION'S EXHIBIT 244-C

(Letterhead of Automatic Canteen Company of America,  
 Chicago)

July 19, 1943.

Community Industries Association,  
 811 South Hamilton St.,  
 Sullivan, Illinois.

Attention: Miss Leah E. Harshman

Dear Miss HARSHMAN:

We realize that there may be some logical justification for allocating goods under this type of an arrangement due

to the fact that our distributors are authorized now to buy 68¢ goods providing they find that the amount of goods we allocated them is not sufficient to take care of their requirements.

We will appreciate hearing from you on this matter.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid/mh

[fol. 457] COMMISSION'S EXHIBIT 244-F

(Letterhead of Automatic Canteen Company of America,  
Chicago)

September 27, 1945.

Community Industries Ass'n,  
811 South Hamilton Street,  
Sullivan, Illinois.

Attention: Miss Leah L. Harshman

Dear Miss HARSHMAN:

We appreciate your early response to our recent request for additional bars and assume from your letter of the 26th that we should now place orders for our distributors for an additional 24,800 bars which are to be packed in 18/24's per case. These orders will be forwarded to you within the next few days.

In the meantime, we would like to clear with you your interpretation of the amount of goods that will be available for future months and how much of it will be available in 200-count at standard billings and how much in 24-count at 68¢ billings.

Very truly yours, R. J. Boid, Assistant Secretary,  
Automatic Canteen Company of America.

RJBoid-mr

[fol. 458]

## COMMISSION'S EXHIBIT 319-C

September 15, 1943.

Mr. R. J. Boid,  
Automatic Canteen Co. of America,  
Merchandise Mart,  
Chicago, Ill.

Dear Mr. Boid:

We would appreciate if you would advise if it would be satisfactory for us to fulfill your quotas using the 24 count boxes at 68¢ per box, in place of the 100 count carton at \$2.65 per carton, freight prepaid?

We have experienced quite a bit of difficulty in obtaining sufficient 100 count cartons for the various accounts that require the larger carton and, in many instances, they have advised that the 24 count box covering their quota will be quite satisfactory under present day conditions.

Of course, part of the quota will be shipped in the 100 count case and the other part shipped in the 24 count box, depending upon the packing materials that we have available.

Yours very truly, The D. L. Clark Company, C. T. Clark.

CTC/ED

[fol. 459]

## COMMISSION'S EXHIBIT 327-A

(Letterhead of Automatic Canteen Company of America,  
Chicago, Ill.)

November 25, 1946.

Mr. F. A. Gregg, President  
Lik-Ein Peanut Co., Inc.  
2515-17 Penn Avenue  
Pittsburgh, Pa.

DEAR MR. GREGG:

Our records show that the cost price to Automatic Canteen Company of America on your 5¢ bag nuts is \$2.40 per

100, delivered as far as Chicago less 1%. Our Bookkeeping Dept. advises me this morning that they have just received an invoice from you for 120 cases of 100 5¢ Virginia Blanched Peanuts to Canteen Service of Southern New York, Elmira, New York at the unit price of \$2.55. This applies to our purchase order #16754 dated 11/11/46.

We have not been advised by your company as to a change of price and would like to have you forward us a credit memorandum for the differential in price.

Sincerely yours, R. H. Mueller, Director of Purchases, Automatic Canteen Company of America.

RHMueller/MC

[fol. 460]

COMMISSION'S EXHIBIT 327-B

November 27, 1946.

Automatic Canteen Co.,  
1430 Merchandise Mart,  
Chicago 54, Illinois.

Attn: Mr. R. H. Mueller.

DEAR MR. MUELLER:

This will acknowledge your letter of the 25th concerning the differential price on our 5¢ salted.

Due to increased material costs and manufacturing costs, we made a general price increase on all of our packaged items. There were several exceptions to be made on this price increase and Automatic Canteen was to be one of these exceptions. We will hold the line on a \$2.40 per 100 price to you because of the nice volume of business we have received lately from you and the volume we expect in the future.

The general price increase caused a little confusion and all of the details were not entirely worked out, which explains the recent billing of your orders at \$2.55. I believe there are 4 orders involved in this price differential. You will find the orders in question listed on the attached credit memorandum which we are enclosing for the amount in-

volved. Your price in the future will be \$2.40 per 100/5¢ salted.

Will you please accept my apology for the delay in getting this matter straightened out with our Billing Department prior to the invoicing of these orders in question. We appreciate your calling this to our attention and are looking forward to our continued mutual cooperation.

Sincerely yours, Lik-Em Peanut Company Inc.,  
**Lloyd R. Dague, Sales Manager.**

LED:ar

Ene. 1

[fol. 461] COMMISSION'S EXHIBIT 341-D

August 11, 1942.

Mr. John P. Ryan, Sales Manager  
Dante Candy Co., Inc.  
517 N. Halsted Street  
Chicago, Illinois

DEAR MR. RYAN:

Confirming our recent conversation regarding the prices of your four different five cent bars packed 100 count, we will be perfectly willing to pay you \$2.20 per case, f.o.b. Chicago beginning September 1st.

Price of \$2.20 will in no way affect our selling price and will still permit the consumer to continue buying these items for five cents.

If and when the contemplated price of \$2.20 per case is approved by the OPA, then please notify us so that we may change our records accordingly.

Your very truly, Automatic Canteen Co.

[fol. 462] COMMISSION'S EXHIBIT 369-A

January 16, 1947.

Automatic Canteen Company of America

Merchandise Mart,

Chicago 54, Illinois.

Attention: Mr. R. H. Mueller.

DEAR MR. MUELLER:

Incidentally, as soon as we get our figures together on the cost of packaging these machines, we may want to suggest a somewhat higher price. At the present time, we are getting 70¢ for 24s in the regular pack, however, we will advise you more fully regarding this a little later; in the meantime, the orders we are shipping will go out at the old price.

Thanking you for your cooperation.

Sincerely yours, Switzer's E. F. Aubuchon.  
EFA:ah

[fol. 463]

## RESPONDENT'S EXHIBIT 3-A.

## AUTOMATIC CANTEEN COMPANY OF AMERICA

No Receipt Required. If not correct, return without alterations, and state differences.

| Invoice Record—Date and Amount |          | Amount Due | Discount or Deductions | Amount of Check |
|--------------------------------|----------|------------|------------------------|-----------------|
| 12-8-39                        | \$287.00 | 12-14-39   | \$205.00               |                 |
| 12-8-39                        | 102.50   | 12-15-39   | 820.00                 | \$3792.50       |
| 12-9-39                        | 205.00   |            |                        |                 |
| 12-11-39                       | 102.50   |            |                        |                 |
| 12-12-39                       | 153.75   |            |                        |                 |
| 12-12-39                       | 358.75   |            |                        |                 |
| 12-12-39                       | 82.00    |            |                        |                 |
| 12-12-39                       | 256.25   |            |                        |                 |
| 12-12-39                       | 164.00   |            |                        |                 |
| 12-12-39                       | 30.75    |            |                        |                 |
| 12-13-39                       | 820.00   |            |                        |                 |
| 12-13-39                       | 102.50   |            |                        |                 |
| 12-14-39                       | 102.50   |            |                        |                 |

## Distribution

| Accts. | Amount  |
|--------|---------|
| 3711   | 3792.50 |

Coded by H. J.

Check No. 784.

Voucher No. 710.

Automatic Canteen Company of America

Chicago, Ill. December 29, 1939.

Pay to the Order of Curtiss Candy Company \$3716.65

622 Diversey Parkway  
Chicago, IllinoisVoucher Check Approved for  
Entered Entered Payment

|       |       |          |
|-------|-------|----------|
| H. J. | E. A. | F.A.O.R. |
|-------|-------|----------|

Automatic Canteen Company of America

President—Vice-President

Vice-President—Treasurer

[lot. 464]

## RESPONDENT'S EXHIBIT 3-B.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to

Automatic Canteen Co.  
104-106 No. Union Ave.  
Los Angeles, Calif.

Date Dec. 8, 1939.

Sold to

Automatic Canteen Co. of America  
Room 1430 Merchandise Mart  
Chicago, Illinois

Ship via

Office Code

Your Order No.

Candy Assoc Car Collect

House 0104004 A

361 12081208

Invoice No.  
44115

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 80      | 80             | Baby Ruth Uncartoned                 | 100             | 2.10  | 168.00    |
| 40      | 40             | Butterfinger Uncarton                | 100             | 2.10  | 84.00     |
| 20      | 20             | Moon Spoon Uncartoned                | 100             | 2.10  | 42.00     |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
| 140     | 02330 0000 00  |                                      |                 |       | 294.00*   |
|         |                | Less Freight Allowance 5¢ per Carton |                 |       | 7.00      |
|         |                |                                      |                 |       | 287.00    |

|                          |
|--------------------------|
| Distribution Account No. |
| 3711                     |
| Coded by A               |

|          |
|----------|
| 287.00   |
| 102.50   |
| 205.00*  |
| 102.50   |
| 153.75   |
| 358.75   |
| 82.00    |
| 256.25   |
| 164.00   |
| 30.75    |
| 820.00   |
| 102.50   |
| 402.50   |
| 205.00   |
| 820.00   |
| 3,792.50 |
| 2%       |
| 75.85    |
| 3,716.65 |

[fol. 465]

## RESPONDENT'S EXHIBIT 3-C.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to Canteen Co.  
1734 No. 5th St.,  
Philadelphia, Penn.

Sold to Automatic Canteen Co. of America  
Room 1430 Merchandise Mart  
Chicago, Illinois

Ship via Pac. & Atlantic Collect

Office Code House 0136147 A

Your Order No. 318

Date Dec. 8, 1939.

Invoice No. 44117

| Cartons | Deals or Boxes | Description                                 | Weight or Count | Price | Extension |
|---------|----------------|---|-----------------|-------|-----------|
| 50      | 50             | Butterfinger Uncarton<br>Terms Net FOB Chgo | 100             | 2.10  | 105.00    |
|         | 50             | 00800 0000                                  |                 |       | 105.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton        |                 |       | 2.50      |
|         |                |   |                 |       | 102.50    |

Distribution  
Account No.  
3711  
Coded by A

## RESPONDENT'S EXHIBIT 3-D.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to Canteen Co.  
182 Kingsland Rd.  
Nutley, New Jersey

Sold to Automatic Canteen Co. of America  
Room 1430 Merchandise Mart  
Chicago, Illinois

Ship via Adme Fast Frt Collect

Office Code House 0128064 A

Your Order No. 395

Date Dec. 9, 1939.

Invoice No. 44823

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 50      | 50             | Baby Ruth Uncartoned                 | 100*            | 2.10  | 105.00    |
| 50      | 50             | Moon Spoon Uncartoned                | 100             | 2.10  | 105.00    |
|         |                | Terms Net FOB Chgo                   |                 |       | 105.00*   |
| 100     | 01600 0000     | Less Freight Allowance 5¢ Per Carton |                 |       | 210.00*   |
|         |                |                                      |                 |       | 5.00      |
|         |                |                                      |                 |       | 205.00    |

Distribution  
Account No.  
3711  
Coded by A

[fol. 466]

**RESPONDENT'S EXHIBIT 3-E**

(Original Invoice—Curtiss Candy Co.—Chicago)

|                |   |          |                |
|----------------|---|----------|----------------|
| Ship to        | Canteen Co.<br>1040 W. Baltimore<br>Detroit, Mich.                                  | Date     | Dec. 11, 1939. |
| Sold to        | Automatic Canteen Co. of America<br>Room 1430 Merchandise Mart<br>Chicago, Illinois |          |                |
| Ship via       | Roadway Transit Collect   |          |                |
| Office Code    | House 0120026 A   |          | Invoice No.    |
| Your Order No. | 202   | 12081208 | 44114          |

| Cartons | Deals or Boxes | Description                                | Weight or Count | Price | Extension |
|---------|----------------|--|-----------------|-------|-----------|
| 50      | 50             | Baby Ruth Uncartoned<br>Terms Net FOB Chgo | 100             | 2.10  | 105.00    |
|         | 50             | 00875 0000 00                              |                 |       | 105.00    |
|         |                | Less Freight Allowance 5¢ Per Carton       |                 |       | 2.50      |
|         |                |  |                 |       | 102.50    |

Distribution  
Account No.  
3711  
Coded by A

**RESPONDENT'S EXHIBIT 3-E.**

(Original Invoice—Curtiss Candy Co.—Chicago)

|                |   |         |                      |
|----------------|---|---------|----------------------|
| Ship to        | Canteen Co.<br>1642 Beason St.<br>Baltimore Md.                                     | Date    | Dec. 12, 1939.       |
| Sold to        | Automatic Canteen Co. of America<br>Room 1430 Merchandise Mart<br>Chicago, Illinois |         |                      |
| Ship via       | General C. L. Collect   |         |                      |
| Office Code    | House 0118002 A   |         | Invoice No.<br>45349 |
| Your Order No. | 530   | 121112M |                      |

| Cartons | Deals or Boxes | Description                                | Weight or Count | Price | Extension |
|---------|----------------|--|-----------------|-------|-----------|
| 75      | 75             | Baby Ruth Uncartoned<br>Terms Net FOB Chgo | 100             | 2.10  | 157.50    |
|         | 75             | 01312 0000 00                              |                 |       | 157.50*   |
|         |                | Less Freight Allowance 5¢ Per Carton       |                 |       | 3.75      |
|         |                |  |                 |       | 153.75    |

Distribution  
Account No.  
3711  
Coded by A

[fol. 467]

## RESPONDENT'S EXHIBIT 3-G.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to            Automatic Canteen Co.            Date Dec. 12, 1939.  
 4633 Gladys Ave.  
 Chicago, Illinois

Sold to            Automatic Canteen Co. of America  
 Room 1430 Merchandise Mart  
 Chicago, Illinois

Ship via            Collect                              Invoice No.  
 Office Code        House                              45785  
 Your Order No.    591                                  12111211

| Cartons | Deals or Boxes | Description   | Weight or Count | Price | Extension       |
|---------|----------------|---|-----------------|-------|-----------------|
| 175     | 175            | Baby Ruth Uncartoned<br>Completes Order<br>Terms Net FOB Chgo | 100             | 2.10  | 367.50          |
| 175     | 03062 0000 00  | Less Freight Allowance 5¢ Per Carton                          |                 |       | 367.50*<br>8.75 |
|         |                |   |                 |       | 358.75          |

Distribution  
Account No.  
3711  
Coded by A

Merchandise Dec. 12, 1939 Received.

## RESPONDENT'S EXHIBIT 3-H.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to            Canteen Co.                              Date Dec. 12, 1939.  
 727 N. 19th St.  
 Allentown, Penn.

Sold to            Automatic Canteen Co. of America  
 Room 1430 Merchandise Mart  
 Chicago, Illinois

Ship via            Acme Collect                              Invoice No.  
 Office Code        House                              45928  
 Your Order No.    9690                                  12121212

| Cartons | Deals or Boxes | Description                                | Weight or Count | Price | Extension      |
|---------|----------------|--|-----------------|-------|----------------|
| 40      | 40             | Baby Ruth Uncartoned<br>Terms Net FOB Chgo | 100             | 2.10  | 84.00          |
| 40      | 00700 0000 00  | Less Freight Allowance 5¢ Per Carton       |                 |       | 84.00*<br>2.00 |
|         |                |  |                 |       | 82.00          |

Distribution  
Account No.  
3711  
Coded by A

[fol. 468]

## RESPONDENT'S EXHIBIT 3-I.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to Automatic Canteen Co. Date Dec. 12, 1939.  
 4633 Gladys Ave.  
 Chicago, Illinois

Sold to Automatic Canteen Co. of America  
 Room 1430 Merchandise Mart  
 Chicago, Illinois

Ship via Collect  
 Office Code House 0111204 A  
 Your Order No. 591 12111211 Invoice No. 45786

| Cartons | Deals or Boxes | Description   | Weight or Count | Price | Extension |
|---------|----------------|---|-----------------|-------|-----------|
| 125     | 125            | Baby Ruth Uncartoned<br>Balance to Follow<br>Terms Net FOB Chgo | 100             | 2.10  | 262.50    |
|         | 125            | 02187 0000 .00  |                 |       | 262.50*   |
|         |                | Less Freight Allowance 5¢ Per Carton                            |                 |       | 6.25      |
|         |                |   |                 |       | 256.25    |

Merchandise Dec. 12, 1939 Received

 Distribution  
 Account No.  
 3711  
 Coded by A

## RESPONDENT'S EXHIBIT 3-J.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to Canteen Co. Date Dec. 12, 1939.  
 363 W. King St.  
 York, Penn.

Sold to Automatic Canteen Co. of America  
 Room 1430 Merchandise Mart  
 Chicago, Illinois

Ship via Penn SDD Collect  
 Office Code House 0136216 A  
 Your Order No. 636 12121212 Invoice No. 45929

| Cartons | Deals or Boxes | Description                                  | Weight or Count | Price | Extension |
|---------|----------------|--|-----------------|-------|-----------|
| 30      | 30             | Baby Ruth Uncartonned                        | 100             | 2.16  | 63.00     |
| 50      | 50             | Moon Spoon Uncartonned<br>Terms Net FOB Chgo | 100             | 2.10  | 105.00    |
|         | 80             | 01250 0000 0                                 |                 |       | 168.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton         |                 |       | 4.00      |
|         |                |  |                 |       | 164.00    |

 Distribution  
 Account No.  
 3711  
 Coded by A

[Vol. 469]

## RESPONDENT'S EXHIBIT 3-K.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to                    Canteen Co. of Williamsport                    Date Dec. 12, 1939.  
                           375 W. Third St.  
                           Williamsport, Penn.

Sold to                    Automatic Canteen Co. of America  
                           Room 1430—Merchandise Mart,  
                           Chicago, Illinois

Ship via                    Penn R R Collect  
                           Office Code House 0136242 A                    Invoice No.  
                           Your Order No. 756                                    45930

| Cartons | Deals or Boxes | Description                                    | Weight or Count | Price | Extension |
|---------|----------------|--|-----------------|-------|-----------|
| 15      | 15             | Baby Ruth Uncartoned 100<br>Terms Net FOB Chgo | 100             | 2.10  | 31.50     |
|         | 15             | 00262 0000 00                                  |                 |       | 31.50*    |
|         |                | Less Freight Allowance 5¢ Per Carton           |                 | .75   |           |
|         |                |  |                 |       | 30.75     |

|   |
|---|
| Distribution<br>Account No.<br>3711<br>Coded by A |
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## RESPONDENT'S EXHIBIT 3-L.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to                    Automatic Canteen Co.                    Date Dec. 13, 1939.  
                           4633 Gladys Ave.  
                           Chicago, Illinois

Sold to                    Automatic Canteen Co. of America  
                           Room 1430—Merchandise Mart  
                           Chicago, Illinois

Ship via                    Collect  
                           Office Code House 0111204 A                    Invoice No.  
                           Your order No. 803                            46244

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 300     | 300            | Baby Ruth Uncartoned 100             | 100             | 2.10  | 630.00    |
| 100     | 100            | Moon Spoon Uncartoned 100            | 100             | 2.10  | 210.00    |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
|         | 400            | 06700 0000                           |                 |       | 840.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton |                 | .20   | .20       |
|         |                |                                      |                 |       | 820.00    |

Merchandise Dec. 13, 1939 Received

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| Distribution<br>Account No.<br>3711<br>Coded by A |
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[fol. 470]

## RESPONDENT'S EXHIBIT 3-M.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to              Automatic Canteen Co.              Date Dec. 13, 1939.  
                     H. S. Reed  
                     955 Grand Ave.  
                     Syracuse, N. Y.

Sold to              Automatic Canteen Co. of America  
                     Room 1430 Merchandise Mart  
                     Chicago, Illinois

Ship via              National Carloading Collect  
                     House              0130108 A  
                     Your Order No.      895              12131213              Invoice No. 46448

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 10      | 10             | Moon Spoon Uncartoned                | 100             | 2.10  | 21.00     |
| 40      | 40             | Baby Ruth Uncartoned                 | 100             | 2.10  | 84.00     |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
| 50      | 50             | 00845 0000 00                        |                 |       | 105.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton |                 |       | 2.50      |
|         |                |                                      |                 |       | 102.50    |

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| Distribution Account No. 3711<br>Coded by A |
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## RESPONDENT'S EXHIBIT 3-N.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to              Canteen Co.              Date Dec. 14, 1939.  
                     182 Kingsland Rd.  
                     Nutley, New Jersey

Sold to              Automatic Canteen Co. of America  
                     Room 1430 Merchandise Mart  
                     Chicago, Illinois

Ship via              Adme Fast Frt Collect  
                     House              0128064 A  
                     Your Order No.      12131213              Invoice No. 46447

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 50      | 50             | Baby Ruth Uncartoned                 | 100             | 2.10  | 105.00    |
|         |                | Balance to Follow                    |                 |       |           |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
| 50      | 50             | 00875 0000 00                        |                 |       | 105.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton |                 |       | 2.50      |
|         |                |                                      |                 |       | 102.50    |

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| Distribution Account No. 3711<br>Coded by A |
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[fol. 471]

## RESPONDENT'S EXHIBIT 3-O.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to      Canteen Co.      Date Dec. 14, 1939.  
               1734 No. 5th St.  
               Philadelphia, Penn.

Sold to      Automatic Canteen Co. of America  
               Room 1430 Merchandise Mart  
               Chicago, Illinois

Ship via      Pac & Atlantic Collect  
               Office Code House      0136147 A  
               Your Order No. 909      12141214      Invoice No. 47149

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 100     | 100            | Baby Ruth Uncartoned                 | 100             | 2.10  | 210.00    |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
| 100     | 01750.0000     |                                      |                 |       | 210.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton |                 |       | 5.00      |
|         |                |                                      |                 |       | 205.00    |

Distribution  
Account No.  
3711  
Coded by A

## RESPONDENT'S EXHIBIT 3-P.

(Original Invoice—Curtiss Candy Co.—Chicago)

Ship to      Automatic Canteen Co.      Date Dec. 15, 1939.  
               4633 Gladys Ave.  
               Chicago, Illinois

Sold to      Automatic Canteen Co. of America  
               Room 1430 Merchandise Mart  
               Chicago, Illinois

Ship via      Collect  
               Office Code House      0111204 A  
               Your Order No. 1048      12141214      Invoice No. 47567

| Cartons | Deals or Boxes | Description                          | Weight or Count | Price | Extension |
|---------|----------------|--------------------------------------|-----------------|-------|-----------|
| 300     | 300            | Baby Ruth Uncartoned                 | 100             | 2.10  | 630.00    |
| 100     | 100            | Moon Spoon Uncartoned                | 100             | 2.10  | 210.00    |
|         |                | Terms Net FOB Chgo                   |                 |       |           |
| 400     | 06700.0000     |                                      |                 |       | 840.00*   |
|         |                | Less Freight Allowance 5¢ Per Carton |                 |       | 20.00     |
|         |                |                                      |                 |       | 820.00    |

Distribution  
Account No.  
3711  
Coded by A

Merchandise Dec. 15, 1939 Received

## [fol. 472] BEFORE FEDERAL TRADE COMMISSION

STIPULATION—June 9, 1949

It is stipulated and agreed by and between Counsel in support of the complaint and Counsel for the respondent in respect to the Commission's order of May 5, 1949, providing, among other matters, that the above proceeding be reopened solely for the purpose of complying with the "Order Disposing of Respondent's Appeal From Trial Examiner's Rulings," as follows:

(a) It is stipulated and agreed by and between counsel in support of the complaint and counsel for the respondent that those who sign this stipulation hereby waive offering any further proof provided for by order of May 5, 1949, except as provided for in this stipulation and further agree, as they did in the stipulation dated February 18, 1949, that the factual record upon which this case may be decided upon the merits, shall be the record provided for by the order of the Commission of May 5, 1949, except as may be added to by the provisions of this stipulation as follows:

(b) That respondent hereby waives any further cross-examination of Commission's witnesses Jasper P. Edwards and Walter H. Mann. (R. 1953-1955 and R. 2089-2090—Respondent's Exceptions numbered 55 and 65 on appeal).

(c) That in respect to respondent's exceptions numbered 17, 18, 26, 30, 31, 38, 39, 41, 42, 45, 47, 48, 50 and 66 under item VIII of Commission's order of May 5, 1949, counsel in support of the complaint and counsel for the respondent hereby stipulate that all of said witnesses would have made answers relating to respondent's knowledge of the seller's savings in cost in accordance with the offers of proof propounded in the record by respondent's counsel which answers shall become part of the record as though answered by each and every witness.

[Said offers of proof were as follows:

Fred E. Foster, President, Sperry Candy Company, Exception No. 17, Transcript, Pages 514 and 541.

Q. Mr. Foster, did you ever tell Automatic Canteen

Company that your price differential to them was in excess of your savings in cost in serving them?

[fol.473] I would like to make an offer of proof at this time. When Mr. Foster of the Sperry Candy Company was on the stand, I asked him this question: "Did you ever tell Automatic Canteen Company that your price differential to them was in excess of your savings in cost in serving them?"

Counsel for the government objected to that question and your Honor sustained the objection. I should like to say that if Mr. Foster had been permitted to answer that question he would have answered "no".

Trial Examiner Bayly: That tender and offer is accepted in the record, and will be made a part thereof.

Frank J. Kimbell, President, Kimbell Candy Company, Exception No. 18, Transcript, Pages 605, 606 and 607:

Q. Did you ever tell Automatic Canteen Company that your price differential to them was in excess of your savings in cost in serving them?

Trial Examiner Bayly: The objection is sustained for the reasons already given in the record.

Mr. Howrey: If your Honor please, may I make an offer of proof?

Trial Examiner Bayly: You may.

Mr. Howrey: If the witness had been allowed to answer this question, he would have answered "no".

Julius P. Schmidt, Sales Manager, Ziegler Candy Company, Exception No. 26, Transcript, Page 823:

Q. Mr. Schmidt, did you ever tell Automatic Canteen Company, or Mr. Boid of that company, that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a minute. I make the same objection as made before, and ask for the same ruling.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, I should like to make an offer of proof. If this witness were permitted to answer that question, he would answer "no".

[fol. 474] George H. Williamson, President, Williamson Candy Company, Exception No. 30, Transcript, Page 911.

Q. I have one further question: Did you ever tell Automatic Canteen Company or any of the officials of the Automatic Canteen Company that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a moment. I object on the grounds which we have stated in the record previously, and I ask for the same ruling as previously made by your Honor.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, may I make an offer of proof? If this witness were permitted to answer that question, he would answer "no".

Ralph A. Hull, Purchasing Agent of Schutter Candy Company, Exception No. 31, Transcript, Pages 925 and 926.

Q. Mr. Hull, did you ever tell Automatic Canteen Company or any of its officials that your price differential to them was in excess of your savings in costs in serving them?

Mr. Forkner: Just a moment. I object to the question, your Honor, on the same grounds as stated previously in the record, and ask your Honor to make the same ruling.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, I should like to make an offer of proof. If the witness had been permitted to answer the question he would have answered "no".

Frank J. Ellis, Vice President, Wrigley Company, Exception No. 38, Transcript, Pages 1233 and 1234.

Q. Mr. Ellis, Commission's Exhibit 37 shows or rather, purports to show certain differentials between your prices to Automatic Canteen Company and your prices to certain other identified customers.

Now, let me ask you this question, did you ever tell Automatic Canteen Company, or any of its officials, that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a moment. Your Honor, I object to the question for the same reason and ask for the same rul-

[fol. 475] ing and; in addition, I might say that this witness just testified that he knows nothing about the cost; that he didn't deal with them on a cost basis, and, therefore, has no knowledge or information. It is therefore inappropriate to question him on that.

Mr. Howrey: I might say that counsel questioned him concerning that at great length, concerning the difference in price. He pointed out differences in packaging, differences in administrative costs, and various other reasons.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, may I make an offer of proof?

Trial Examiner Bayly: Yes, you may, Mr. Howrey.

Mr. Howrey: If this witness had been permitted to answer the question, he would have answered, "no."

Carl Behr, Vice President of Paul F. Reich Company, Exception No. 39, Transcript, Page 1290.

Q: Mr. Behr, Commission's Exhibit 54 shows or rather purports to show that there was certain differentials between your prices to Automatic Canteen Company and your prices to certain other customers?

Now, I should like to ask you this question: Did you ever tell Automatic Canteen Company or any of its officials that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a minute. Don't answer. I object, your Honor, on the same grounds that I have objected before.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, I should like to make an offer of proof.

Trial Examiner Bayly: You may.

Mr. Howrey: If this witness had been permitted to answer the question, he would have answered, "no."

Richard C. Gillespie of Curtiss Candy Company, Exception No. 41, Transcript, Pages 1365 and 1366.

Q: Mr. Gillespie, Commission's Exhibits 59-A to 59C, which were introduced through you, show or purport to show that there were certain differentials between Curtiss'

price to Automatic Canteen Company and its prices to other customers. Did you ever tell Automatic Canteen [fol. 476] Company or any of its officials that your price differential to them was in excess of your savings in cost in serving them?

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: May I make an offer of proof, your Honor?

Trial Examiner Bayly: Yes, you may.

Mr. Howrey: If Mr. Gillespie had been permitted to answer the question, he would have answered, "no".

William C. Jakes, Production Manager, Curtiss Candy Company, Exception No. 42, Transcript, Pages 1417 and 1418. 8

Q. Mr. Jakes, Commission's Exhibit 59-A to C, which I now hand you, shows or purports to show certain differentials between your prices to Automatic Canteen Company and your prices to other customers. Did you ever tell Automatic Canteen Company, or any of its officials, that your price differential to them was in excess of your savings in costs in serving them?

Mr. Forkner: Just a moment. I ask that the witness not answer until I make objection. Are you through?

Mr. Howrey: I am through, yes.

Mr. Forkner: I wish your Honor to object to the question for the reasons already stated in the record and ask that the same ruling be made.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, may I make an offer of proof?

Trial Examiner Bayly: You may.

Mr. Howrey: If this witness had been permitted to answer the question, he would have answered, "no".

H. Stanley Graihund, Vice President of the Shotwell Manufacturing Company, Exception No. 45, Transcript, Page 1451.

Q. Did you ever tell Automatic Canteen Company, or any of its officials, that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a moment. Don't answer.

[fol. 477] Trial Examiner Bayly: Objection sustained.

Mr. Howrey: Now, may I make an offer of proof, your Honor?

Trial Examiner Bayly: You may. Sure.

Mr. Howrey: If this witness were allowed to answer the question, he would answer, "no".

Clarence O. Mattheis, Vice President of Walter H. Johnson Candy Company, Exception No. 47, Transcript, Pages 1496 and 1497.

Q. Did you ever tell Automatic Canteen Company or any of its officials that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: I make the same objection, your Honor, for the same reasons and ask for the same ruling. In addition, I want to state that the record shows that this witness did not have any conversation relating to price.

Mr. Howrey: I did not ask him whether or not he ever had any conversations. I asked him whether he told Automatic Canteen Company so or any of its officials?

Trial Examiner Bayly: Well, you may make your tender now, Mr. Howrey.

Mr. Howrey: I take it that the objection is sustained.

Trial Examiner Bayly: The objection is sustained.

Mr. Howrey: I should like to make this offer of proof. If the witness had been permitted to answer the question, he would have answered, "no".

Ernest Wallin, Accountant for the Queen Anne Candy Company, Exception No. 48, Transcript, Page 1507.

Q. Commission's Exhibits 64-A to C which you brought in in response to a subpoena shows or purports to show certain differentials between your prices to Automatic Canteen Company and your prices to other customers, such

as the jobber, and so forth. Now, let me ask you this question:

Did you ever tell Automatic Canteen Company or any of its officials that your price differential to them was in excess of your savings in cost in serving them?

Mr. Forkner: Just a moment. I object on the same grounds that I have already stated in the record and ask for the same ruling.

[fol. 478] Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, may I make a tender of proof?

Trial Examiner Bayly: You may.

Mr. Howrey: My tender of proof is as follows: If this witness had been permitted to answer the question he would have answered "no".

Ralph Boid, Assistant Secretary of the Automatic Canteen Company, Exception No. 50, Transcript, Pages 1846 and 1847.

Q. Mr. Boid, did any of the suppliers of the Automatic Canteen Company ever tell you that such price differential as you may have received from them was in excess of their savings in cost in serving Automatic Canteen Company?

Mr. Forkner: Just a moment. I instruct the witness not to answer until I have made my objection.

I object to the question on the same ground as stated in the record, and ask your Honor to make the same ruling as was made in the past.

Trial Examiner Bayly: Objection sustained.

Mr. Howrey: If your Honor please, may I make an offer of proof?

Trial Examiner Bayly: You may.

Mr. Howrey: My offer of proof is as follows: If this witness had been permitted to answer the question he would have answered, "no".

Walter H. Mann, President of Wilbur-Schwarz Chocolate Company, Inc., Exception No. 66, Transcript, Pages 2103 and 2104.

Q. Now, relating to your distribution cost first, did you ever tell Automatic Canteen Company, or any of its offi-

cials, that your price differential to them was in excess of your savings in distribution costs in serving them?

I am not asking you whether they were or were not. I am asking you whether you ever told anyone that they were in excess.

Mr. Forkner: Just a moment. I instruct the witness not to answer, and I make this objection:

Your Honor, I object to the question for the same reasons that we have many times stated in the record, and on [fol. 479] which your Honor has ruled, and I might add that I see no change in this particular situation from the other situations in which the same ruling was made by your Honor.

Trial Examiner Bayly: The objection is sustained.

Mr. Howrey: Your Honor, may I make an offer of proof?

Trial Examiner Bayly: You may.

Mr. Howrey: I offer to prove that if this witness had been permitted to answer the question that he would have answered, "no".

That each of said witnesses would have answered on cross-examination by counsel in support of the complaint in the following manner which questions and answers shall become a part of the record as though answered by each and every witness.

Further Cross Examination by Counsel in Support of Complaint on Respondent's Exceptions Numbered 17, 18, 26, 30, 31, 38, 39, 41, 42, 45, 47, 48 and 66 as follows:

(1) Q. Did the Automatic Canteen Company of America or its representatives, in their discussions with your company or your representatives, ever inquire whether your price differentials with which Automatic Canteen Company of America was or might have been favored were in excess of your savings in cost in serving them or otherwise inquire whether the differentials with which Automatic Canteen Company of America was or might have been favored were in excess of the cost savings effected by methods or practices involved in the transactions?

A. No, they did not.

(2) Q. Did Automatic Canteen Company of America or its representatives ever ask for a written statement or

affidavit from your company or its representatives that your price differential with which Automatic Canteen Company of America was or might have been favored was not in excess of your savings in cost in serving them?

A. No, they did not.

(3) Q. Did Automatic Canteen Company of America or its representatives ever inquire if your company or its representatives had made up or secured any exact cost figures showing that your price differential with which Automatic Canteen Company of America was or might have been favored was not in excess of your savings in cost in serving them?

A. No, they did not.

[fol: 480] Further Cross-Examination by Counsel in Support of Complaint on Respondent's Exception No. 50

(4) Q. Did you in any of your discussions with suppliers ever ask whether price differentials with which Automatic Canteen Company of America was or might have been favored were in excess of the suppliers' savings in cost in serving Automatic Canteen Company of America, or otherwise inquire whether the differentials with which the Automatic Canteen Company of America was or might have been favored were in excess of the cost savings effected by methods or practices involved in the transactions?

A. No, I did not.

(5) Q. Did you in any of your discussions with suppliers ever ask for a written statement or affidavit that the price differential with which Automatic Canteen Company of America was or might have been favored was not in excess of the suppliers' savings in cost in serving Automatic Canteen Company of America?

A. No, I did not.

(6) Q. Did you in any of your discussions with suppliers ever inquire if the suppliers had made up or secured any exact cost figures showing that the price differential with which Automatic Canteen Company of America was or might have been favored was not in excess of the suppliers' savings in cost in serving the Automatic Canteen Company of America?

A. No, I did not.

This stipulation shall be incorporated in and made a part of the record herein.

Dated this 9th day of June, 1949.

(S.) Austin H. Forkner, Attorney Supporting the Complaint.

Sanders, Gravelle, Whitlock & Howrey, (S.) By L. A. Gravelle, Counsel for Respondent.

[fol 481] BEFORE FEDERAL TRADE COMMISSION

STIPULATION—February 18, 1949

Whereas, pursuant to the provisions of the Clayton Act, as amended, the Federal Trade Commission on March 19, 1943, issued its complaint against the respondent named in the caption hereof and caused such complaint to be served as required by law, in which it was charged in Count I that said respondent had violated the provisions of Section 3 of the Clayton Act in the leasing and licensing of its automatic vending machines to the distributors and franchise holders in commerce between and among the several states of the United States and in the District of Columbia, and in the sale of candy, gum, peanuts and similar confectionery products suitable for use in said automatic vending machines and in which it was charged in Count II that said respondent was and had been violating the provisions of Section 2(f) of said Clayton Act, as amended on June 19, 1936, by the Robinson-Patman Act; and

Whereas, extensive hearings were thereafter held before a Trial Examiner of the Federal Trade Commission, during which extensive documentary and oral evidence was introduced into the above record in support of said complaint; and

Whereas, at the conclusion of the evidence in support of the complaint, the respondent filed a motion to dismiss before the Commission, which motion was duly overruled; and

Whereas, at the close of all evidence the respondent filed an appeal from certain rulings of the Trial Examiner pursuant to Rule XX of the Commission's Rules of Practice and

asked for oral argument before the Commission, which request for oral argument has been granted; and

Whereas, the parties hereto wish to expedite the proceedings, and it being to the best interest of the public and the parties hereto that further litigation before the Commission be avoided and that it be concluded as promptly as possible;

It is therefore stipulated and agreed, by and between counsel in support of the complaint, subject to the approval of the Director of the Bureau of Litigation and the Trial Examiner, and the respondent and the respondent's counsel, as follows:

[fol: 482] That if the Commission should, when it reaches a decision on the merits in this matter, decide to issue an order to cease and desist and should not issue one broader or more stringent than the one attached hereto as a proposed order to cease and desist, then it is agreed and stipulated that the record herein may be taken with the understanding that respondent waived further hearing or contest in this proceeding before the Commission as would have been afforded it under the law and the Commission's Rules of Practice and to have consented that the Commission after it has made its decision on the pending appeals from rulings of the Trial Examiner, and after the Trial Examiner has closed the record and has made a report to the Commission thereon, including his recommended findings and recommended order as provided for by law, may proceed without further intervening procedure (filing of briefs, oral arguments, etc.) to make and enter its findings as to the facts and its conclusions based thereon from the testimony and exhibits then in the record as heretofore introduced and admitted; and further proceed to make its decision on the merits and enter an order to cease and desist from the acts, practices and methods complained of; provided that such order to cease and desist as it may thus enter is no broader in scope or stringent in its provisions than that proposed pursuant to the terms of this stipulation and as attached hereto. In the event that the Commission should decide to issue an order to cease and desist herein and to issue one broader in scope and more stringent in its provisions than the one proposed under the terms of this stipulation and attached hereto, then the respondent shall be considered to

be in such position as if this stipulation had not been executed or entered into.

In the meantime, pending the Commission's consideration of this matter as to whether it shall enter an order to cease and desist, counsel in support of the complaint shall proceed to draw up proposed findings of fact and conclusions of law, based upon the testimony, exhibits and record in the above matter which shall then be submitted to the Trial Examiner and the Commission; that said Trial Examiner shall pass upon said proposed findings of facts and conclusions of law, or in the alternative proceed to prepare his own findings of the facts and conclusions of law, as his discretion dictates, which shall then be filed with the Commission.

It is further agreed and stipulated that the failure of the [fol. 483] respondent to file any further motions, exceptions, briefs, or make any further oral argument before the Commission, or the act of consenting to the entry of the attached order shall not be construed as an admission or acquiescence by respondent to any proceedings had or taken, or to be taken herein. The respondent by this stipulation reserves its right at any subsequent proceeding, whether the same be by way of appeal from any order which may be entered herein or in resisting any subsequent enforcement proceedings that may be instituted in any court of competent jurisdiction, or to enforce any order that may be entered herein, in such subsequent proceedings to attack the validity or the propriety of any order entered herein by the Commission on the ground that said order is not supported by competent or admissible evidence or was not supported by the facts; or was not justified in law; or in any other manner or on any other ground, to the same extent as though respondent had exhausted all procedural steps before the Trial Examiner, and before the Commission, or had taken any other action before the Commission permitted by law or by the Rules of Practice of the Commission.

The said stipulated order attached hereto is made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals and for any review in the Supreme Court of the United States, or in any other court proceeding which may be brought or instituted by virtue of the authority contained in the laws ad-

ministered by the Federal Trade Commission, and is not for any other purpose or for use in any other proceeding.

The intent and purpose of this stipulation is to permit the expeditious disposition of the within matter before the Commission, without respondent's waiving any rights for its failure to further object before the Commission on account of any proceedings heretofore had or which may hereafter be taken by the Commission.

It is further stipulated and agreed that counsel in support of the Complaint may urge before the Commission or its members the immediate adoption of this stipulated settlement and if possible before the date of March 3, 1949, which date has been set for oral argument before the Commission on respondent's appeals from the Trial Examiner's rulings. It is further provided that in the event the Commission should cause respondent or its counsel to be informed on or [fol. 484] before 2:00 p. m. of March 2, 1949, that it has disapproved the mode of disposition of this matter provided for by the terms of this stipulation, then it is understood that the oral argument now scheduled to be heard by the Commission in this matter commencing at 2:00 p. m., March 3, 1949, will be heard as scheduled.

Provided, however, that nothing contained in this stipulation shall be taken to preclude or to prejudice the Commission from acting as provided by law to reopen this proceeding at any time in the future to modify any order to cease and desist it may enter herein, when such action in reopening is taken only after the Commission has given notice to the respondent and given it an opportunity for hearing and the reopening is in the opinion of the Commission based upon changed conditions of fact or of law as to require such action or that it is required by the public interest.

This stipulation shall be incorporated in and made a part of the record herein.

Dated this 18th day of February, 1949.

Automatic Canteen Company of America, By Nathaniel Leverone, Chairman of Board.

Sanders, Gravelle, Whitlock & Howrey, Attorneys for Automatic Canteen Company of America.

Friedlund, Levin & Friedlund, General Counsel for Automatic Canteen Company of America.

Austin H. Forkner, Attorney Supporting the Complaint.

Approved By: Charles B. Bayly, Trial Examiner for Commission.

Richard P. Whiteley, Director, Bureau of Litigation.

Federal Trade Commission, Approved March 2, 1949.  
By D. C. Daniel, Secretary.

[fol. 485] BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C.

Commissioners: Lowell B. Mason, Acting Chairman; Garland S. Ferguson, Ewin L. Davis, William A. Ayres.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the testimony and other evidence in support of the allegations of the complaint introduced before Charles B. Bayly, a duly appointed trial examiner of the Commission, designated by it to serve in this proceeding, and upon a stipulation between counsel in support of the complaint and counsel the respondent, subject to the approval of the Federal Trade Commission that there was a waiver of all intervening procedure and further hearing as to the said facts and conclusions that said respondent has violated the provisions of subsection (f) of Section 2 and Section 3 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

1. It Is Ordered that the respondent, the Automatic Canteen Company of America, a corporation, and its officers, representatives, agents, and employees, directly or

through any corporate or other device in connection with the licensing, leasing, operation or sale of any vending machines or parts thereof or in connection with the sale, or making of any contract for the buying or sale, of candy, gum, peanuts, or other similar 1¢, 5¢, or 10¢ packaged or sized products suitable for coin-operated vending machines in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Making, enforcing, or continuing in operation or effect, any contract or condition in a contract, to buy or sell [fol. 486] candy, gum, peanuts, or any other similar 1¢, 5¢ or 10¢ packaged or sized goods, suitable for coin-operated vending machines, on the condition, agreement, or understanding that respondent's purchaser, customer, distributor, franchise holder, vendee, licensee, or lessee of respondent's automatic vending machines shall not buy, use, or deal with the products supplied by any other seller, supplier, or competing of the respondent or that respondent's purchaser, customer, distributor, franchise holder, vendee, licensee or lessee will order from the respondent all such products required or on the further condition, agreement, or understanding that such purchaser, customer, distributor, franchise holder, vendee, licensee, or lessee of the respondent shall not permit in or use in or with automatic vending machine's licensed, leased, sold, or owned by the respondent the above named products of any other seller, supplier, or competitor of the respondent.

(2) Making, enforcing, or continuing in operation any condition, contract of sale, license, or lease any condition, agreement or understanding that respondent's purchaser, customer, distributor, franchise holder, vendee, licensee, or lessee of the respondent thereof shall not acquire, manufacture, own, hold, locate, use, operate, lease or otherwise deal with any automatic vending machine other than that sold by or acquired, licensed, or leased from the respondent or from some source authorized by the respondent, or further on the condition, agreement, or understanding that the respondent's purchaser, customer, distributor, franchise holder, vendee, licensee or lessee shall not sell or offer to sell any products purchased from the respondent except by

means of automatic vending machines licensed or leased by the respondent to such parties.

(3) Without limiting the generality of subparagraphs (1) and (2) of Paragraph I of this order, such agreement, contract, or understanding shall not include any conditions or stipulations to the following effect:

(a) That the respondent's vendee, licensee, lessee, distributor, or franchise holder shall not acquire, manufacture, own, hold, locate, use, operate, lease or otherwise deal with any automatic vending machine other than that sold, acquired, licensed, or leased to such licensee, vendee, lessee, distributor or franchise holder, or,

(b) That the respondent's purchaser, customer, vendee, licensee, lessee, distributor or franchise holder will order and purchase from the respondent all candy, gum, peanuts, [fol. 487] or other similar 1¢, 5¢, or 10¢ packaged merchandise and not buy the same from any other seller, supplier, or competitor of the respondent, or,

(c) That the respondent's vendee, licensee, lessee, distributor or franchise holder shall not use or sell, or cause or permit to be used or sold, any merchandise purchased from the respondent by such vendee, licensee, lessee, distributor, or franchise holder in any automatic vending machine other than that sold by or licensed or leased from the respondent; and that the respondent's vendee, licensee, lessee, distributor or franchise holder shall not use or sell or attempt to use or offer to sell in or by means of any automatic vending machine sold by, or licensed or leased from the respondent any merchandise other than that purchased by such vendee, licensee, lessee, distributor, or franchise holder from the respondent, or,

(d) That if the respondent's vendee, licensee, lessee, distributor or franchise holder thereof fails to comply with the aforesaid conditions specified in subparagraphs (a), (b), and (c) above during a specified period of time after written notice from respondent, all rights of said vendee, lessee, distributor, or franchise holder shall be terminated, including the right to the possession and use of such automatic vending machines which might be thereafter immediately repossessed by respondent and removed by respond-

ent from the respective sales locations or from the premises of said vendee; lessee, or licensee, or

(e) That the respondent's vendee, licensee, lessee, distributor, or franchise holder thereof, upon the termination of said license or lease either by lapse of time or by respondent upon the breach of any of the conditions aforesaid specified in subparagraphs (a), (b), and (c) above, shall not own, license, lease or deal in any automatic vending machine of any kind or character or sell any merchandise of any kind or character by means of any automatic vending machine within the franchise territory of such vendee, lessee, or licensee for a specified period of years after the termination of said lease or license.

(4) It is further provided, however, that nothing contained in this order shall be construed as prohibiting the respondent from entering into agreements with its distributors providing for payment by such distributors to the respondent of such compensation as respondent may desire for the use of its vending machines and for services rendered and for the protection of quality and saleability of [fol. 488] products vended through respondent's vending machines, of its franchise territories and distribution, of its good will and trade name, of its rental and additional income. The development and retention of the respondent's business in the distributor's territory, and the protection of the public, when such action is not in conflict with any of the provisions of this order.

II. It Is Further Ordered that the respondent, the Automatic Canteen Company of America, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the purchase of candy, gum, peanuts, or any other similar 4¢, 5¢, or 10¢ packaged or sized goods suitable for coin-operated vending machines in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Knowingly receiving or accepting or knowingly inducing any discrimination in price for goods of like grade and quality between the respondent and other purchasers or customers of a person, seller, or manufacturer where the effect of such discrimination may be substantially to lessen

competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person, manufacturer, or seller who either grants or knowingly receives the benefit of such discrimination, or with the purchasers or customers of any of them.

(2) Knowingly receiving or accepting from any person, manufacturer or seller, or knowingly inducing any such person, manufacturer or seller to grant, any discrimination in price prohibited by Section 2 of the Clayton Act, either directly or by means of any discount, deduction, allowance, or by other means, device, or practice.

For the purpose of determining whether "prices" are different under the terms of this order, there shall be taken into account, discounts, rebates, allowances, deductions and other terms and conditions of sale.

III. It Is Further Ordered that the respondent, the Automatic Canteen Company of America, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the purchase of candy, gum, peanuts, or any other similar 1¢, 5¢, or 10¢ packaged or sized goods suitable for coin-operated vending machines in commerce, as "commerce" is [fol. 489] defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Knowingly receiving or accepting from any person, manufacturer, or seller, or knowingly inducing any such person, manufacturer, or seller to grant, a discrimination of anything of value to, or for the benefit of, the respondent as compensation or in consideration for any services or facilities furnished by or through the respondent when the respondent knows that such payment or consideration is not available or accorded on proportionally equal terms to all other customers or purchasers of such person, manufacturer, or seller and who are, in fact, competing with each other in the distribution of such products or commodities.

(2) Knowingly receiving or accepting from any person, manufacturer or seller, or knowingly inducing any such person, manufacturer or seller to grant directly or indirectly, any discriminatory allowances, discounts, or deductions from the price paid as compensation or in consideration for any services or facilities furnished or benefits con-

ferred by or through the respondent when the respondent knows that such payment, allowance, discount, deduction, or consideration is not available or accorded on proportionally equal terms to all other customers or purchasers of such person, manufacturer or seller who are, in fact, competing with each other in the distribution of such products or commodities.

IV. It Is Further Ordered that the respondent, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the processing, handling, sale, or offering for sale of candy, gum, peanuts, or similar 1¢, 5¢, or 10¢ packaged or sized goods, suitable for coin-operated vending machines in commerce, as "Commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Knowingly receiving or accepting from any person, manufacturer or seller or knowingly inducing any such person, manufacturer or seller to grant a discrimination in favor of the respondent as against another purchaser or customer of the same person's, manufacturer's or seller's goods of like grade, quality and brand bought for resale, any services or facilities connected with the processing, [fol. 490] handling, sale or offering for sale of such products so purchased upon terms which the respondent knows are not accorded or made available on proportionally equal terms to all purchasers or customers of such person, manufacturer or seller, and who are, in fact, in competition with each other in the distribution of such products or commodities.

(2) Knowingly receiving or accepting from any person, manufacturer, or seller or knowingly inducing any such person, manufacturer or seller to grant a discrimination in favor of the respondent as a purchaser or customer and against another purchaser or customer of the same person's, manufacturer's or seller's candy, gum, nuts, and confectionery products of like grade, quality and brand bought for resale by contracting with such person, manufacturer or seller to give or furnish, or contribute directly or indirectly, to the giving or the furnishing of any services or facilities in connection with the processing, handling, sale, or the offering for sale of such products so purchased when

the respondent knows that such services or facilities are not accorded to or made available on proportionally equal terms to all other purchasers or customers of such person, manufacturer or seller's products, and who are, in fact, in competition with each other in the distribution of such products or commodities.

If It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

By the Commission,

D. C. Daniel, Secretary.

[fol. 491] BEFORE FEDERAL TRADE COMMISSION

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson.

FINDINGS AS TO THE FACTS AND CONCLUSION—June 6, 1950

Pursuant to the provisions of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraint and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act); as amended by an Act of Congress, approved June 19, 1936 (the Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by said Act, the Federal Trade Commission on March 19, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, Automatic Canteen Company of America, a corporation, charging it with violation of Section 3 and of subsection (f) of Section 2 of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other

evidence were duly recorded and filed in the office of the Commission. On February 18, 1949, after the record was closed for the taking of testimony, a stipulation was entered into by and between counsel supporting the complaint and respondent and its counsel. By the terms of this stipulation it was agreed, among other things, that if the Commission, when it reached a decision on the merits in this matter, should decide to issue an order to cease and desist and should issue such an order no more broad in scope and no more stringent in its provisions than the proposed order attached to, and made a part of, said stipulation, the Commission might proceed upon the record without further intervening procedure to make its findings as to the facts and its conclusion based thereon from the testimony and exhibits theretofore introduced and admitted, and enter its order requiring the respondent to [fol. 492] cease and desist from the acts, practices, and methods complained of after it had made its decision upon pending appeals from rulings of the trial examiner and after the trial examiner had closed the record and filed his recommended decision. The Commission accepted and approved this stipulation on March 2, 1949. On May 5, 1949, it rendered its decision upon the aforesaid appeals from rulings of the trial examiner. The trial examiner closed the record on July 15, 1949, and filed his recommended decision on August 16, 1949.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and other evidence, the accepted and approved stipulation, and the recommended decision of the trial examiner and exceptions thereto (no briefs having been filed and oral argument not having been requested, according to the terms of the stipulation); and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

#### Findings As To The Facts

Paragraph One: Respondent, Automatic Canteen Company of America, is a corporation organized and existing under and by virtue of the laws of the State of Delaware,

with its principal office and place of business located at 222 West North Bank Street, Chicago, Illinois.

Paragraph Two: (a) The respondent is now, and since June 19, 1936, has been, engaged in the business of purchasing candy, gum, nuts, and other confectionery products from the producers thereof and in the resale of these products directly through automatic vending machines and to various persons, firms, or corporations known as "canteen distributors." These canteen distributors in turn resell the same merchandise to the public by means of automatic vending machines leased from the respondent and located in offices, factories, and other commercial establishments. The respondent has also been engaged in the development, acquisition, ownership, operation, and leasing of automatic coin-operated vending machines which are designed to, and do, dispense candy, gum, nuts, and other confectionary products to purchasers for consumption at the point of purchase.

[fol. 493] (b) The respondent, for nearly twenty years last past, has been engaged in purchasing nationally known candy and confectionary products of standard weight and quality from many manufacturers and producers located in various states and reselling them, principally as a wholesaler, to lessees of its automatic vending machines. In carrying out this function, it is, and has been, principally engaged as a wholesaler of candy, gum, nuts, and other confectionary products. The automatic vending machines operated by its customers were leased by it to various persons, firms, and corporations called "canteen distributors," who operate and have operated these machines as independent contractors in territories specifically described and set out by the respondent, throughout the several states of the United States. The respondent owns a substantial number of such leased machines located in many states and used within each of the territorial limits specifically defined and circumscribed by it. The lessees of respondent's automatic vending machines, hereinafter referred to as "distributors," have been, and are, its sole customers for the products it purchases and sells as a wholesaler. The number of such distributors has varied from time to time, but as of January 11, 1946, there were 83 such distributors operating automatic vending machines in 112 separate territories located in 33 states and in the District of

Columbia. Prior to April 12, 1942, respondent operated a retail division of its own, through which it sold merchandise through automatic vending machines in northern Illinois, including the metropolitan area of Chicago.

Paragraph Three: (a) As a part of respondent's primary function in merchandising candy, gum, nuts, and other confectionary products, it has spent considerable time and effort in developing the possibility of automatically retailing these and other items through leased vending machines. Upon its incorporation in 1931, respondent acquired from Chicago Automatic Canteen Company and The Canteen Company a small number of standard candy canteens designed to deliver candy bars through a single mechanism. Different sizes and shapes of bars could be placed in this type of canteen, but the customer had no choice in purchasing merchandise placed therein and was compelled to accept the kind of candy bar delivered in response to the deposit of his coin. Respondent continued to purchase this type of automatic vending machine for [fol. 494] about three years, at the end of which time it owned approximately 40,000.

(b) In 1935 respondent developed a selective candy canteen, which gradually replaced the standard canteens in the hands of its distributors. This selective candy canteen consisted of a machine having five columns installed in a cabinet, which permitted the customer to select five kinds of candy bars. By means of display windows in each column, the customer was enabled to observe samples of these bars. On January 11, 1946, there had been manufactured for respondent a total of 91,217 selective candy canteens, of which the respondent then owned approximately 87,750. Substantially all canteens or automatic vending machines for all types of products are in the possession of respondent's distributors through the operation of a lease agreement between respondent and these distributors.

(c) Beginning in the year 1932 respondent introduced the standard gum canteen operated on the same principle as the standard candy canteen. In 1938 respondent arranged for the manufacture of a selective gum canteen which it had previously designed. This canteen per-

January 11, 1946, respondent had purchased a total of approximately 54,941 selective gum canteens, of which it then owned approximately 52,000.

(d) In 1935 respondent added a coin or automatic vending machine for the dispensing of peanuts and other types of nuts. This machine consisted primarily of a glass bowl mounted on a vending device. Respondent has purchased approximately 42,249 such machines, and on January 11, 1946, owned approximately 36,500. In 1938 it introduced a selective nut canteen, which gradually replaced the glass-bowled type and offered the customer a choice of two varieties of nuts. On January 11, 1946, it had purchased approximately 45,243 such machines, of which it then owned approximately 43,000.

(e) Respondent does not own or control any manufacturing facilities and has never manufactured any of its vending machines. It purchases them under contract from manufacturers. The number of machines manufactured for respondent prior to January 11, 1946, the original replacement value fixed by it in its contracts with distributors, and the number estimated to be owned as of [fol. 495] January 11, 1946, are summarized in the following table.

| No. Machines (Canteens) Manufactured | Replacement Value | No. Owned by Respondent |
|--------------------------------------|-------------------|-------------------------|
| 40,000 Standard Candy                | \$13.50           | None                    |
| 91,217 Selective Candy               | 45.00             | \$50.00                 |
| 30,013 Standard Gum                  | 5.00              | 10,900                  |
| 54,941 Selective Gum                 | 10.00             | 52,000                  |
| 42,249 Standard Nut (2-lb.)          | 5.00              | 36,500                  |
| 45,243 Selective Nut                 | 10.00             | 43,000                  |
| 303,663 Total Canteens               | \$14,75 Av.       | 230,150                 |

Paragraph Four: (a) Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce among and between the various states of the United States and in the District of Columbia.

(1) In the course and conduct of its business in the purchase and resale of candy, gum, nuts, and other confectionery products since June 19, 1936, respondent has caused said products to be shipped from its principal place of business in the State of Illinois or from the various places of

tors at their respective points of location in various other states of the United States and in the District of Columbia.

(2) In carrying on its business in the leasing and licensing of automatic vending machines, respondent has caused said machines, when leased, to be shipped and transported from its principal place of business in the State of Illinois or from the places of manufacture of such machines located in several other states of the United States to the points of location of its respective distributors or to its places of business located in other states of the United States and in the District of Columbia.

Paragraph Five: Respondent's largest distributor as of January 11, 1946, consisted of a partnership known as the "Canteen Company," which was principally owned by Nathaniel Leverone, Chairman of the Board of Directors of the respondent company, and his brother L. E. Leverone, its President. This partnership operated as a canteen [fol. 496] distributor in 17 territories, and its volume of business for the five fiscal years prior to January 11, 1946, accounted for 24.7 per cent of the total retail sales reported by all canteen distributors during that period. This distributor operated automatic vending machines in 17 cities located in nine states and in the District of Columbia. Another large distributor operated under the name "Canteen Service Company." This was a corporation organized on September 29, 1945, and succeeded a partnership of the same name in which the Leverone brothers were the only partners. The majority of the stock of this corporation was owned by these brothers. It operated principally in Cook County, Illinois, and embraced the greater metropolitan area of Chicago and some other parts of the county. For the fiscal year ending September 29, 1945, its retail sales amounted to 10.06 per cent of all retail sales reported by respondent's canteen distributors. Both the Canteen Service Company and the Canteen Company occupied offices at the same location as the respondent and shared, on a proportionate basis, in the expenses of rental, accounting, clerical, and other services rendered.

Paragraph Six: (a) Through the use of contracts between respondent and its distributors or lessees, respondent leased automatic vending machines to said distributors for varied specified periods of time and required them to

purchase all merchandise sold in said machines solely from it. These lease agreements, among other things, provided that said distributors or lessees would not buy, use, or deal with the products supplied by any other seller or supplier, or any competitor of the respondent. Said agreements further provided that the distributors or lessees of the vending machines leased from respondent would not acquire, manufacture, own, hold, locate, use, operate, lease, or otherwise deal with any automatic vending machine not sold, licensed, or leased by respondent or otherwise acquired from it.

(b) The provision of the aforesaid contract dealing with the purchase of merchandise by the distributor is as follows:

"The Distributor, further in consideration of the leasing of the aforesaid Canteens, does hereby covenant and agree that it will order and purchase from the Company [fol. 497] all candy, confections, gum, peanuts and other merchandise (of the kind or type which may from time to time be carried by the Company as hereinafter specified) which the Distributor may require throughout the period of this Agreement, for resale by means of the Canteens leased hereunder, at the price and upon the terms hereinafter in this Article specified."

(c) The provision of the contract with respect to the sale of merchandise required:

"That the Distributor shall not use or sell, or cause or permit to be used or sold, any merchandise purchased by the Distributor from the Company hereunder in any automatic vending machine other than the Canteens leased by the Distributor hereunder; that the Distributor shall not sell or offer to sell any merchandise purchased hereunder except by means of the Canteens leased hereunder; and that the Distributor shall not use or sell or attempt to use or offer to sell in or by means of any Canteen leased hereunder any merchandise other than that purchased by the Distributor from the Company hereunder." Q.Q

(d) The provision dealing with the leasing of automatic vending machines required:

"That the Distributor shall not during the period of this agreement acquire, manufacture, own, hold, locate, use,

operate, lease or otherwise deal with any automatic vending machine other than the Canteens leased to the Distributor hereunder."

(e) By the terms of said license agreement, respondent's distributors or lessees, upon the termination thereof either by lapse of time or upon the breach of any of the conditions specified in paragraphs (b), (c), and (d) above and others, were prohibited from owning, licensing, leasing, or dealing in any automatic vending machine of any kind or character and from selling any merchandise of any kind or character by means of any automatic vending machine within the territory specified by such agreement with the distributor or lessee for a period of five years. The provisions of the lease agreement covering these conditions are as follows:

"1. The Distributor expressly covenants and agrees that the Distributor shall not, at any time during the period of five (5) years from and after the date of the termination of this agreement (whether by lapse of time or otherwise), [fol. 498] directly or indirectly, or under any circumstances or conditions whatsoever, own, sell, lease, operate or otherwise deal in any automatic vending machine of any kind or character, or sell or offer to sell any merchandise of any kind or character by means of any type of automatic vending machine, within the territory hereinbefore described.

"2. The Distributor further agrees that from and after the date of the termination of this agreement (whether by lapse of time or otherwise) the Distributor shall not, directly or indirectly, employ or use the word 'Canteen' or the phrase 'Automatic Canteen' in or in connection with any business to be conducted by the Distributor in any other manner."

(f) Each of the contracts contained a paragraph providing for its termination as follows:

"It is expressly agreed that if the Distributor shall, (a) fail or refuse during a period of three (3) consecutive months to keep, observe and fulfill the terms, covenants and guarantees contained in Paragraphs 1, 2, or 3 of Article IV hereof; or (b) the Distributor shall make default in the performance of any of the other agreements, conditions, covenants or terms herein contained and such default

shall continue for a period of fifteen (15) days after written notice thereof from the Company to the Distributor; or (c) if the Distributor shall at any time be adjudicated insolvent or a bankrupt; or (d) if the Distributor shall at any time make a general assignment for the benefit of creditors or take the benefit of any insolvency act; or (e) if a receiver or trustee of the interest of the Distributor hereunder shall be appointed by a court of competent jurisdiction; or (f) if this agreement or the interest of the Distributor hereunder shall be transferred or pass to or devolve upon any other person, firm or corporation, except in the manner hereinbefore permitted; then and in each such event, the Company shall have the right, without further notice, to terminate and end this lease and agreement, as well as all of the right title and interest of the Distributor hereunder."

(g) By other provisions in said contracts or agreements the distributor guaranteed, throughout the period of operation thereunder, that he would at all times maintain on active sales locations a portion of all automatic vending machines leased, of each type specified in the agreement [fol. 499], as theretofore delivered to him, a number equivalent to at least 90 per cent of all automatic vending machines of the same type owned by respondent and leased by it to all of its distributors under the terms of similar agreements. This agreement further provided that the distributor would maintain a sales volume through respondent's automatic vending machines and a ratio of automatic vending machines on sales locations in proportion to the population of his territory related to the average sales volume and ratio of sales location of all canteen distributors. In the event of default in performance by a distributor of this or of any of the other covenants or undertakings of said distributor, the respondent was entitled to terminate the lease and all of the title and interest of the distributor under the agreement.

(h) This lease and sale agreement which respondent had with its distributors contains a number of miscellaneous provisions and requirements which were directly related to each of the provisions set forth in paragraphs (b) to (g), inclusive. Some of these provided that the distributor follow certain standard practice as set out by the respondent

and required reports on the conduct of the distributor's business. The distributor was required to purchase all his repair parts from the respondent, but the respondent reserved the right to sell, rent, locate and make arrangements for the location, operation, and use of vending machines and merchandise to be sold therefrom in the distributor's territory where such machines or the sale of such merchandise involved chain organizations, interstate concessionaires, and public utility transportation systems. The distributor was prohibited from disposing of his business without the consent of the respondent.

(i) The basic agreements above referred to were modified from time to time primarily due to wartime conditions. Beginning in 1942 the respondent gave various distributors permission to make certain direct purchases from local jobbers or from certain manufacturers and processors upon payment to it of a fee, as rental for use of its automatic vending machines, based upon the amount of such purchases. In every instance respondent reserved the right to terminate such permission in whole or in part, with or without cause. Beginning on or about December 20, 1942, respondent granted permission to its' distributors to purchase merchandise direct from national manufacturers or [fol. 500] suppliers and jobbers and to resell the same by means of automatic vending machines leased by the respondent to said distributors on condition that before reselling any type of candy bar or other vending machine packaged goods, a sample of such merchandise would be submitted to the respondent, together with a statement of the price to be paid and the quantity, if the purchase was from other than a jobber, and, further, that on or before the tenth day of each month the distributor would furnish the respondent a statement in writing of all candy bars and other package~~d~~ goods purchased and received during the next preceding period, together with the name and address of each supplier and the price paid. The distributor, on or before the tenth of each month, was required to pay to the respondent ten cents for each 100 candy bars or other similarly packaged goods purchased by such distributor during the next preceding period. On April 11, 1942, this payment was increased to 25 cents for each 100 bars. Permission was also given these distributors to purchase per-

nuts and other nuts, as well as chewing gum, but similar conditions were imposed with respect to such purchases.

Paragraph Seven: As an aid in carrying out the full force and effect of the provisions of its exclusive-dealing contracts described in Paragraph Six, the respondent organized the Swan Candy Company as its wholly owned subsidiary with identical officers and located at the same office as respondent. Some of respondent's distributors were advised, instructed, or directed to purchase of and pay the Swan Candy Company for all merchandise desired of certain suppliers, while certain suppliers of respondent were advised, instructed, or directed to sell to respondent's distributors only through the Swan Candy Company.

Paragraph Eight: (a) The effect of the respondent's exclusive-dealing contracts containing the conditions and agreements described herein has been, is, and may be to substantially lessen competition or tend to create a monopoly in both lines of commerce in which the respondent is engaged, namely, the sale and purchase of candy, gum, nuts, confectionery products, and other similar packaged merchandise suitable for use in automatic vending machines and the development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines. [fol. 501] (b) These exclusive-dealing contracts have resulted in a substantial lessening of competition between respondent's suppliers of candy, nuts, confectionery products, and other packaged merchandise and their competitors, who have been, and are, unable to sell similar products to respondent. This lessening of competition tends to create a monopoly in the manufacturers and processors who sell such merchandise to the respondent. Competition has also been substantially lessened between respondent and its competitors and between respondent's distributors and their competitors. Such lessening of competition tends to create a monopoly in the respondent and its distributors in the resale of the aforesaid products. Several of respondent's own suppliers who received limited orders and many competitors of its suppliers who have been unable to sell respondent were, and have been, ready, willing, and able to supply respondent's distributors such products as they have required, and now require, for sale through automatic vending machines, but have been prohibited from doing so.

because of the restrictions, conditions, and limitations set forth in Paragraphs Six and Seven above.

(c) Competition has also been substantially lessened between vending-machine manufacturers and others who are, and have been, able to sell such machines to respondent, and their competitors, who have been able to sell only to other vending-machine purchasers, which tends to create a monopoly in the vending-machine manufacturers and suppliers who sell such machines or parts to the respondent. From time to time one or more manufacturers of automatic vending machines have been, and are now, ready, willing, and able to supply respondent or its distributors, with such machines and would have supplied them had it not been for the restrictions, conditions, and limitations set out in Paragraphs Six and Seven. These vending-machine manufacturers have generally refrained from attempting to sell their machines to respondent's distributors. Where such sales have been attempted, expensive litigation, trouble, and loss have resulted to each vending-machine manufacturer or the respondent's distributor to whom said manufacturer was attempting to make a sale. For this reason, respondent's distributors have generally refrained from using or dealing in automatic vending machines of any person, firm, or corporation other than respondent and have generally complied [fol. 502] with the terms of the contracts existing between them and the respondent with respect to such purchases.

Paragraph Nine: (a) In the course and conduct of its business since June 19, 1936, the respondent has knowingly induced, and knowingly received, lower prices from the suppliers from whom it purchased candy, gum, nuts, food, and other confectionary products than the prices paid by the respondent's competitors from the same manufacturers and suppliers for products of like grade and quality. The prices paid by respondent to various sellers and suppliers of such products have consistently ranged from slightly less than 12 per cent to slightly more than 33 per cent lower than the prices paid by respondent's competitors for products of like grade and quality. These sellers generally pack candy bars and other confectionary products designed to retail at five cents per bar in boxes or cartons containing 100, 60, and 24 such bars. Their standard or usual prices for such boxes or cartons when sold to most of respondent's

competitors between 1936 and 1942 were \$2.50, \$1.50, and 64 cents, respectively, while thereafter such prices increased generally to \$2.65, \$1.60, and 68 cents, respectively. Respondent, purchasing candy bars and other confectionary products of like grade and quality from the same sellers principally in boxes or cartons of 100 bars, between 1936 and 1942, paid prices ranging from \$1.95 to \$2.25 per box and thereafter paid prices ranging from \$2 to \$2.62 per box. Respondent has been, and is now, receiving such price differentials from approximately 80 of its 115 suppliers.

(b) The aforesaid prices and price differentials vary from seller to seller and from product to product of the same seller. Typical and illustrative of these differentials and the different prices paid are the following: The Euclid Candy Company of Illinois, Inc., during 1938 sold its "Jumbo," "Love Nest," and "Melt Away" candy bars to respondent in 100-count boxes at \$2 per box, while selling them to respondent's competitors at \$2.50 per box. In 1939 this company sold its "Jumbo" bars to respondent at \$2 per box, its "Cowboy" and "Big Game" bars at \$1.95, while selling these identical products to other customers at \$2.50. In 1940 it sold its "Rusty" and "Cowboy" bars in 100-count packages to respondent at \$1.95, while selling them to other customers at \$2.50. In 1941 it sold its "Cowboy," "Dolly Dimple," "Four Star," "Victory," and "Jumbo" bars to respondent in 100-count packages at [fol. 503] \$1.95, while selling them to respondent's competitors at \$2.50. In 1942 this company sold its "Jumbo," "Dolly Dimple," "Cowboy," and "Four Star" bars in 100-count to respondent at \$2 per box, while selling these same bars in the same count to respondent's competitors at \$2.65. In 1943 this firm sold its "Dolly Dimple," "Jumbo," and "Four Star" bars in 100-count boxes to respondent at \$2.15 and to respondent's competitors at \$2.65. In 1945 and 1946 this firm sold its "Love Nest" bars to respondent at \$2.62 in 100-count packages, while selling them to respondent's competitors at \$2.65. All sales by this firm to respondent were made f.o.b. Chicago, while sales to other customers were made on a delivered basis. During 1938, 1939, and 1940, the George Ziegler Company sold its "Big Swing" and "Giant" candy bars in 100-count to the respondent at \$2.65, while selling them to respondent's com-

petitors at \$2.10. In 1942 this company sold its "Mounties" bars in 100-count packages to respondent at \$2.10, while sales to its competitors were made at \$2.45. In 1947 the F. W. Washburn Candy Corporation sold its peanut bars in 100-count boxes to respondent at \$2.80 per box, while selling said bars to respondent's competitors at \$2.85 in 100-count packages. This same company during 1939, 1940, and 1941 sold its cocoanut bars to respondent in 100-count boxes at \$1.85, while it sold the identical product in the same count to respondent's competitors at \$2.10. Linden's, Inc., in 1939 sold its "Fifth Avenue" bar in 100-count packages to respondent at \$2.20 per box, while selling the same product to some of its competitors at \$2.25 per box and to other such competitors at \$2.50 per box.

(c) Respondent made no attempt to show that any of the price differentials received from these or other suppliers make only due allowance for differences in cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products were to the respondent sold or delivered.

(d) The price differences herein described constitute discriminations in price between purchasers of commodities of like grade and quantity who have been, and are, either competitively engaged with each other in the sale and distribution of such commodities or whose ultimate purchasers or customers have been, and are, so engaged.

(e) The respondent's gross profits on candy, nuts, gum, and other confectionery products were composed almost [fol. 504] entirely of preferential discounts which it exacted from its suppliers. For example, the Wm. Wrigley Jr. Co. sold the respondent \$8,823,728.83 worth of gum from 1937 to 1945, inclusive, at 38 cents per hundred sticks. Respondent sold this gum to its distributors at 56 cents per hundred, which resulted in a markup of approximately 46 per cent above the purchase price and permitted the respondent a gross profit of approximately \$4,091,386.58. Other customers competing with respondent or its distributors paid the Wrigley Co. 55 cents per hundred sticks, or approximately \$12,771,240 for the same quantity of gum of the same grade and quality, which amounts to \$3,947,471.57, or approximately 44 per cent more than the respondent paid for the same gum. Of the \$4,091,386.58 gross profit resulting

from the sale of Wrigley's gum alone in the years 1937 to 1945, inclusive, \$3,947,471.57, or approximately 96 per cent, consisted of the difference between what others paid and the lower or preferential price which was granted to the respondent by the Wrigley Co. during those years.

Paragraph Ten: (a) The respondent or its distributors have been, and are, actively engaged in competition in commerce with vending-machine manufacturers or operators, jobbers, and retailers in performing the function of purchasing and reselling candy, gum, nuts, and other confectionary products; in developing, owning, designing, and improving coin-operated vending machines; in developing and finding suitable locations for such machines; and in the operation thereof. In the same trade areas in which there have been, and are, located automatic vending machines owned by respondent and operated by its distributors in factories, theatres, office buildings, oil stations, etc., there have been, and are, also located other automatic vending machines operated by other customers of respondent's suppliers, as well as factory canteens, candy and gum counters, confectionery wagons, restaurants, grocery stores, and other retail outlets distributing merchandise of like grade and quality in competition with the respondent or its distributors. Manufacturers of candy, gum, nuts, and other confectionary products compete in the sale of these products to these various retail outlets and in selling to wholesalers and jobbers who resell these products to other retail outlets. In the same trade area and in the same localities in which there have been, and are located automatic vending machines [fol. 505] of respondent, there have been, and are, also located wholesalers and jobbers who have purchased, and now purchase, the same merchandise for resale to vending-machine operators competing with the respondent or its distributors. Said wholesalers and jobbers have sold, and now sell, the same products to other retail outlets who compete with respondent or its distributors. These wholesalers and jobbers also compete between and among themselves in the resale of these products to retail outlets, including competing vending-machine operators.

(b) Manufacturers of coin-operated automatic vending machines have been, and are now, actively competing with each other and with the respondent in the development, de-

sign, perfection, repair, and placement of these machines in suitable locations and in otherwise assisting their vending-machine customers to procure supplies and operate vending machines in order to compete with respondent or its distributors.

Paragraph Eleven: (a) The effect of the price discriminations hereinbefore set forth has been, and may be, substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and purchase of candy, gum, nuts, confectionary products, or other packaged goods suitable for use in coin-operated vending machines, and in the manufacture, development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines suitable for vending said products; and to injure, destroy, or prevent competition between manufacturers and processors of the aforesaid products who grant respondent lower prices and those manufacturers and processors who do not grant such discriminatory prices, between respondent and vending-machine operators who do not receive the benefit of the lower prices received by respondent, between respondent and candy jobbers and wholesalers who do not receive the benefit of such discriminatory prices, between respondent and other retailers of candy, gum, nuts, and other confectionary products who do not receive the benefit of the lower prices granted respondent, and between those manufacturers of automatic vending machines who supply respondent and its distributors and those who do not supply them with such machines.

(b) Competition among the manufacturers and jobbers of candy, gum, nuts, and other, confectionary products is, and has been, such that any differential or discrimination in the price of these products of like grade and quality [fol. 506] may result in a substantial diversion of business to those manufacturers and jobbers who grant such differential or discrimination and substantially reduce the sales of those manufacturers and jobbers who do not grant them. Thus, the effect of any discrimination in price may be to injure, destroy, or prevent competition between those manufacturers and processors of candy, gum, nuts, and other confectionary products who grant respondent lower prices and those manufacturers and processors who do not grant discriminatory prices, and between respondent and whole-

salers or jobbers of such products who do not receive the benefit of discriminatory prices.

(e) Manufacturers and processors who have been, and are, unable to sell their products at the lower prices demanded by respondent have suffered a loss of business as a result of decreased sales and profits. Their sales of candy, gum, nuts, and other confectionary products have been reduced where such sales are made to vending-machine operators, jobbers, and retailers who compete with respondent or its distributors in the sale of such products in the same trade areas. Vending-machine operators who are, and have been, unable to obtain the low prices granted respondent have suffered reduced profits and the loss of vending-machine locations in many instances, resulting in decreased sales by them. The lower prices granted respondent have enabled it and its distributors to earn greater profits, provide more adequate facilities, give better services, and pay a higher rate of commission for preferred locations. From the increase in income resulting from the lower prices received on merchandise purchased, respondent has been able to create departments for accounting, new business, sales, operations, and engineering, and a traffic or product division, all primarily used for the benefit, aid, and assistance of its distributors. Competition between respondent's distributors and other vending machine operators for locations in which to place automatic vending machines has been, and is, very intense and has been, and is now, generally determined by the highest rental bid or the type of service rendered. The principal basis of competition by vending-machine operators is obtaining locations in which to place their machines. By means of the additional income which has accrued to the respondent because of the lower prices granted it, through which respondent rendered special services to its distributors, said distributors were enabled to offer larger commissions [fol. 507] to obtain locations for their machines, which other vending-machine operators were unable to meet or which they were forced to meet at a definite decrease in sales and profits. The average commission granted for locations of automatic vending machines has been ten per cent. However, higher commissions were granted in some

eases by respondent's distributors for the purpose of obtaining competitive locations. In many of such instances competing vending-machine operators were forced to remove their machines from various locations as a result of the higher commissions paid by respondent's distributors. Candy jobbers and wholesalers have been, and are, adversely affected by competitive sales of respondent's products in their local territories. Jobbers have been, and are now, unable to sell candy, gum, nuts, and other confectionary products to respondent's distributors who receive the ultimate benefit of respondent's lower prices through the medium of additional services and aids, which have enabled these distributors to replace other retail outlets. Because of the price advantage received by respondent, it and its distributors have been, and are now, able to procure more and better vending-machine locations, which substantially reduces the business of competing vending-machine operators who ordinarily purchase their merchandise from jobbers, again resulting in a loss of business to candy jobbers and wholesalers.

(d) Retailers other than vending-machine operators competing with respondent and its distributors have suffered a loss of sales or detraction of trade in the neighborhood where said distributors were able to place their vending machines. Because of the decreased sales on the part of vending-machine operators competing with the respondent and its distributors, manufacturers engaged in selling or leasing these machines to such operators have been either forced to reduce their sales of such machines or have been required to increase their services and expenses in competing with the respondent or its distributors.

Paragraph Twelve: (a) Respondent, since its incorporation in 1931, and particularly since 1936, has enjoyed a rapid growth in business and attained a dominant position in the sale and distribution of candy, gum, nuts, and other confectionary products through and by means of automatic vending machines. Such expansion has been primarily due to the exclusive-dealing contracts heretofore described and the reception of lower prices as set out herein. The following illustrates respondent's

growth in merchandise sales, canteen rentals, and net income for the years 1936 to 1945, inclusive:

| Fisc. Yr.<br>end. on or<br>about 9/30 | Mdse. Sales  | Rentals<br>& Other<br>Op. Inv. | Net Income<br>Before Fed.<br>Inc. Taxes | For<br>Year | Dividends<br>Paid on<br>Common<br>Stock |
|---------------------------------------|--------------|--------------------------------|---|-------------|---|
| 1936                                  | \$ 1,937,117 | \$ 127,273                     | \$ 235,635                              | \$202,223   | \$ 9,881                                |
| 1937                                  | 3,573,098    | 255,151                        | 421,152                                 | 354,152     | 385,405                                 |
| 1938                                  | 3,697,104    | 306,126                        | 382,048                                 | 318,048     | 269,584                                 |
| 1939                                  | 4,565,704    | 413,693                        | 514,294                                 | 424,378     | 150,096                                 |
| 1940                                  | 6,139,442    | 469,187                        | 874,185                                 | 717,185     | 273,959                                 |
| 1941                                  | 9,065,727    | 650,625                        | 1,290,273                               | 840,273     | 376,155                                 |
| 1942                                  | 14,706,508   | 887,936                        | 2,167,396                               | 929,896     | 313,252                                 |
| 1943                                  | 14,738,776   | 1,037,730                      | 1,741,395                               | 641,395     | 317,433                                 |
| 1944                                  | 14,253,547   | 1,073,910                      | 1,686,520                               | 602,020     | 320,338                                 |
| 1945                                  | 12,899,106   | 879,970                        | 1,458,219                               | 548,219     | 321,067                                 |

(b) Respondent's sales of candy bars and other packaged goods increased from 53,135,000 for the year ending September 30, 1936, to 335,438,000 for the year ending September 30, 1942. The number of one-cent sticks of gum sold by respondent for these respective periods amounted to 33,409,000 and 355,332,000, while its sales of nuts for the same periods amounted to 808,000 pounds and 6,760,000 pounds, respectively.

Paragraph Thirteen: (a) In the course and conduct of its business since June 19, 1936, respondent has, through its officers and representatives, knowingly induced and knowingly received, and has knowingly sought to induce and receive, the differentials in price set forth in Paragraph Nine above. Officials of respondent knew that many of the prices paid by its competitors were higher than those which it sought to induce and did receive. This knowledge was based primarily on the common information that items purchased by respondent consisting of the one-cent and five-cent variety goods purchased were standard price items. Sales by most suppliers were based on that standard and considered to be common trade information. Variations from the standard price were brought about only by means of discounts, free deals, or other promotional aids made available by manufacturers and suppliers. That officials of respondent had knowledge that it was inducing and receiving lower prices than those granted to its other customers is shown by the following: [fol. 509] (1) The C. S. Allen Corporation, one of re-

spondent's suppliers, on February 13, 1939, addressed a letter to respondent in which it stated:

"To show our good will, we are prepared to take a small loss and quote you \$1.95 C delivered in Chicago, if that will be of any assistance to you."

(2) The president of Town Talk, Incorporated, on March 10, 1943, addressed a letter to respondent which reads in part:

"At all times we have made sales to your Company at substantially lower prices than we made to other Companies and also at substantially lower prices than our ceiling price."

(3) By letter of April 13, 1943, the George Ziegler Candy Company sent the respondent a month-to-month summary of the prices at which it had sold its candy bars to its jobber and other customers for a period of three years. Said prices are all above those which respondent paid for the identical bars of candy purchased from this supplier.

(4) On February 20, 1937, W. F. Schrafft & Sons Corporation addressed a letter to the respondent which reads in part:

"The superior quality of the materials used in the manufacture of our products, our rigid adherence to established standards, combined with the unusual precautions we take to insure uniform quality, will not permit of our meeting the lower prices quoted by other bar manufacturers, as indicated by your letter. \* \* \*

\* \* \* \* We have always refrained from taking any business on which a legitimate profit cannot be secured. On that basis the price we have made is the very lowest which we are able to offer."

(b) Respondent used various methods to induce its suppliers to grant discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it

was reduced below prices at which the particular supplier [fol. 510] sold the same merchandise to others. In other instances respondent sought to explain to the prospective supplier that certain alleged savings would accrue to the supplier in selling to respondent or that certain elements of the supplier's cost could be eliminated, which would in respondent's opinion, justify a lower price. In carrying out this form of inducement, respondent would advise a supplier or prospective supplier of the price which it considered "standard price". In letters written to the Curtiss Candy Company on November 15, 1939, and to W. F. Sehrafft & Sons Corporation on February 15, 1937, respondent summarized alleged savings to these companies as follows:

| Alleged Savings                             | Curtiss Co. | Schrafft Corp. |
|---|-------------|----------------|
| (1) Freight savings of .....                | 6%          | 5% to 7%       |
| (2) Sales cost savings of .....             | 7%          | 7%             |
| (3) 24-count cartons savings of .....       | 5%          | 5%             |
| (4) Return and allowances savings of .....  | 1%          | 1% to 2%       |
| (5) Free deals and samples savings of ..... | 8%          | 2% to X%       |
| (6) Shipping containers savings of .....    |             | 1% to 2%       |
| Total deductions .....                      | 27%         | 24% to 25%     |

Respondent advised these companies that such alleged savings could be made because of the method by which respondent made purchases and because certain services could be eliminated in selling to it.

### Conclusion

The acts and practices of the respondent as herein found of entering into contracts with its various distributors for the leasing of vending machines and the purchase of candy, gum, nuts, or other confectionary products to be sold through these same machines on the condition and with the agreement and understanding that such distributors should not lease, operate, or in any way use vending machines obtained from any other source than the respondent and that such distributors should not purchase for resale through said vending machines leased from the respondent any candy, gum, nuts, or other confectionary products except such products as were sold to the distributor by the respondent, constitute a violation of

Section 3 of the Act of Congress approved October 14, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act).

The acts and practices of the respondent in knowingly inducing and receiving discriminations in the prices of candy, gum, nuts, and other confectionary items of the one-cent and five-cent variety and other products suitable for sale in vending machines, purchased by it from various manufacturers and processors, which, have the effect herein found, constitute a violation of the provisions of Section 2(f) of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act).

By the Commission.

James M. Mead, Chairman.

Issued: June 6, 1950. Attest: D. C. Daniel, Secretary.

#### BEFORE FEDERAL TRADE COMMISSION

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson

ORDER TO CEASE AND DESIST—June 6, 1950

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a trial examiner of the Commission [fol. 512] theretofore duly designated by it, a stipulation entered into between counsel in support of the complaint and the respondent and its counsel, and approved and accepted by the Commission, and recommended decision of the trial examiner and exceptions thereto (no briefs having been filed and oral argument not having been requested according to the terms of the stipulation); and the Commission having made its findings as to the facts and its

conclusion that respondent has violated the provisions of Section 3 of an Act of Congress entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), and subsection (f) of Section 2 of said Act, as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act):

I. It Is Ordered that the respondent, Automatic Canteen Company of America, a corporation, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the leasing, licensing, operation, or sale of any automatic vending machine or parts thereof, or in connection with the offering for sale, sale, or distribution of candy, gum, nuts, or any other confectionary product purchased for resale by or through the use of automatic vending machines, in commerce as "commodore" is defined in the Clayton Act, do forthwith cease and desist from:

A. Entering into, enforcing, continuing in operation or effect, or carrying out any contract, agreement, or understanding for the lease or sale of automatic vending machines or parts therefor, or for the sale of candy, gum, nuts, or other confectionary products for use or resale in such machines on the condition, agreement, or understanding that any lessee, licensee, operator, or purchaser thereof,

1. Shall not acquire, manufacture, own, hold, locate, use, operate, lease or otherwise deal with any automatic vending machine which is not licensed, leased, purchased, or otherwise acquired from respondent or from some source unauthorized by it.

2. Shall not offer to sell, sell, or cause or permit to be sold any candy, gum, nuts, or other confectionary products purchased from respondent other than by means of automatic vending machines leased or purchased from it.

3. Shall not buy for resale, deal with, use, or permit to be used, in automatic vending machines leased or purchased [fol. 513] from respondent, the confectionary products of any seller or supplier other than respondent.

4. Shall order and purchase exclusively from respondent all confectionary products offered for resale by means

of automatic vending machines leased or purchased from respondent.

Provided, however, that nothing contained in the preceding paragraphs numbered 1 through 4 shall be construed as prohibiting respondent from entering into any contract, agreement, or understanding with any lessee, licensee, purchaser, or distributor of its automatic vending machines which provides for payment to the respondent of such compensation as it may desire for the use of its automatic vending machines; for services rendered, for protection of quality and salability of products sold through its said vending machines, or provides for protection of respondent's franchise territories and distribution, of its good will and trade name, of its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public, when none of such provisions are in conflict with the prohibitions set forth herein.

II. It Is Further Ordered that respondent, Automatic Canteen Company of America, a corporation, its officers, agents, representatives, and employees, in connection with the offering to purchase or purchase of any candy, gum, nuts, or other confectionary products of any nature in commerce as "commodore" is defined in the Clayton Act, do forthwith cease and desist from:

A. Knowingly inducing or knowingly receiving or accepting any discrimination in the price of such products, by directly or indirectly inducing, receiving, or accepting a net price from any seller known by respondent or its representatives to be below the net price at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing with other customers of the seller; provided, however, that the foregoing shall not be construed to preclude the respondent from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are by such seller sold or delivered to respondent.

[fol. 514] For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are affected.

III. It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

D. C. Daniel, Secretary

OPINION BY COMMISSIONER MASON, CONCURRED IN BY COMMISSIONERS AYRES, CARSON, AND MEAD—June 6, 1950

In the Matter of Automatic Canteen Company of America; a corporation, Docket No. 4933.

This matter regularly came on before the Commission for final consideration on its merits. The complaint herein was issued on March 19, 1943. It charged respondent, Automatic Canteen Company of America, a corporation, with violation of Section 3 of the Clayton Act through the use of certain exclusive-dealing contracts employed in leasing automatic vending machines in commerce, which machines were designed for the retail sale of candy, gum, nuts, and other confectionary products, and through the use of such contracts in connection with the sale and distribution of such products in commerce. It also charged respondent with violation of subsection (f) of Section 2 of said Act as amended by the Robinson-Patman Act through knowingly inducing and receiving price discriminations in connection with the purchase of candy, gum, nuts, and other confectionary products in commerce. Respondent, in its answer, filed May 11, 1943, denied the material allegations of the complaint. Through a series of delays, caused primarily by wartime conditions, a trial examiner was not appointed until May 26, 1946, at which time the first hearing was ordered to begin on June 26, 1946. Thereafter, a number of hearings were held at various points throughout

the United States, and the last witness was examined on July 3, 1947. During these hearings, more than 7,000 pages of testimony and 6,000 exhibits were introduced into the record as evidence.

The complaint listed fourteen candy manufacturers as representative of those sellers from whom respondent was alleged to have knowingly induced and received discriminations in price. Records or summaries of records of the prices at which more than seventy-five such manufacturers sold their candy, gum, nuts, and other confectionary products covering a period of ten years were obtained by subpoena and introduced into evidence. The Commission is concerned with enforcement of the laws administered by it through the medium of orders to cease and desist. Competent proof of one or more violations would, in ordinary circumstances, be sufficient to establish a factual basis for such an order. The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by government counsel in the instant matter. Neither harassment of litigants nor the waste of government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name fourteen sellers as typical of a group from which respondent had induced or received discriminations in price, and certainly the records of not more than five of such sellers would have supplied ample evidence of such discriminations or price differentials.

On August 4, 1947, after counsel in support of the complaint had rested his case, respondent filed a motion to dismiss, which the Commission denied on January 6, 1948. On March 18, 1948, respondent filed a motion before the trial examiner for reconsideration and reversal of 272 previous rulings on the admissibility of evidence, upon which the trial examiner made his rulings on July 5, 1948. Thereafter, on August 9, 1948, respondent appealed from these rulings. Counsel in support of the complaint filed answer to each of the aforesaid motions and appeals, and on July 8, 1948, filed his own motion for reconsideration and reversal of certain rulings of the trial examiner, which rulings were appealed to the Commission after the trial examiner had rendered his decision with respect thereto. While

these appeals were under consideration by the Commission, pending decision and after the record had been closed for [fol. 516] the taking of testimony, counsel supporting the complaint and respondent and its counsel on February 18, 1949, entered into a stipulation, by the terms of which it was agreed that if the Commission, when it reached a decision on the merits in this proceeding, should decide to issue an order to cease and desist and should issue such an order no more broad in scope and no more stringent in its provisions than the proposed order attached to, and made a part of, said stipulation, the Commission might proceed upon the record, without further intervening procedure, to make its findings as to the facts and its conclusion based thereon from the testimony and exhibits theretofore introduced and admitted, and enter its order requiring respondent to cease and desist from the acts, practices, and methods complained of after making its decision upon the pending appeals from the rulings of the trial examiner and after the trial examiner had closed the record and filed his recommended decision. The Commission accepted and approved this stipulation on March 2, 1949, and on May 5, 1949, rendered its decision upon the aforesaid appeals from rulings of the trial examiner. The trial examiner closed the record on July 15, 1949, and filed his recommended decision on August 10, 1949.

For a number of years respondent has been engaged in the business of purchasing candy, gum, nuts, and other confectionary products from approximately 115 producers thereof and selling them as a wholesaler or jobber to various persons, firms, and corporations which lease its automatic vending machines and which are known as "canteen distributors." These distributors resold these products to the public by means of such machines. Respondent has also been engaged in the development, acquisition, ownership, operation, and leasing of automatic vending machines. It has occupied a dominant position with respect to these two activities. On January 11, 1946, it owned 230,150 candy, nut, and gum vending machines, most of which were leased to its 83 distributors located in 112 separate territories in 33 states and in the District of Columbia. Sales through such machines increased from \$1,937,117 for the year end-

ing September 30, 1936, to \$14,253,547 for the year ending September 30, 1944.

The contracts under which respondent's automatic vending machines were leased to its distributors provided that said distributors or lessees, during the life of such agreement, would order and purchase all merchandise sold in said machines solely from respondent; would not use or sell, or [fol. 517] cause or permit to be sold, any merchandise purchased from respondent in any automatic vending machine not leased to the distributor by the respondent; would not use or sell, or attempt to use or offer to sell, in or by means of any automatic vending machine leased from respondent, any merchandise not purchased from respondent; and would not acquire, manufacture, own, hold, lease, locate, use, operate, or otherwise deal with any automatic vending machine other than such machines as were leased by respondent. These contracts further provided that for a period of five years from the termination thereof, whether by lapse of time or upon breach of certain conditions, distributors or lessees of respondent's vending machines should not, directly or indirectly, or under any circumstances or conditions whatsoever, own, sell, lease, operate, or otherwise deal in any automatic vending machine of any kind or character, or sell or offer to sell any merchandise of any kind or character by means of any type of automatic vending machine; within the territory described in such contract.

These exclusive-dealing contracts have affected a substantial volume of business in both the leasing, sale and distribution of vending machines and the sale and distribution of candy, gum, nuts and other confectionary products. It is apparent that they entirely foreclosed the sale and leasing of vending machines to respondent's distributors by anyone but respondent and that other sellers and suppliers of candy, gum, nuts and other confectionary products have been completely and effectively foreclosed from selling these products to respondent's distributors. Further, respondent's distributors or the lessees of its vending machines have been wholly foreclosed from doing business with any competitor of respondent while these contracts have been in effect and for five years thereafter.

In *International Salt Co. v. U. S.*, 332 U. S. 392, the court stated that "it is unreasonable, per se, to foreclose competitors from any substantial market" and held a similar contract to be in violation of Section 3 of the Clayton Act, even in the absence of evidence that the effect of such a contract may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The record in this proceeding contains an abundance of evidence which proves, beyond any reasonable doubt, that the effect of respondent's exclusive-dealing contracts has been, and may be, to substantially lessen competition or tend to [fol. 518] create a monopoly in both lines of commerce in which respondent is engaged, and the Commission has so found. Such proof more than meets the standard laid down in the case of *Standard Oil Co. v. U. S.*, 337 U. S. 283, in which the court concluded "that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."

Respondent has induced and received discriminations in price from approximately 80 of its suppliers of candy, gum, nuts, and other confectionary products. It has consistently paid these suppliers and sellers from slightly less than 12 per cent to slightly more than 33 per cent less than its competitors paid the same sellers for products of like grade and quality. These price differentials or discriminations varied from seller to seller and from product to product of the same seller. Officers, agents, and representatives of respondent were thoroughly aware that such price discriminations were being induced and received. They knew the prices at which their suppliers were selling candy, gum, nuts, and other confectionary products of like grade and quality to other customers, and employed various means to induce lower prices on purchases by respondent. The evidence of record clearly establishes that respondent at times informed prospective suppliers of the prices and terms of sale which would be acceptable to it without consideration or inquiry as to whether such suppliers could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent

refused to buy unless the price to it was reduced below the prices at which its supplier sold the same merchandise to others. In other instances, respondent sought to, and did, persuade its suppliers and sellers that they could effect certain savings in freight, sales, cartons, return and allowance, free deals and samples, and shipping container costs in selling to respondent, and thus could afford to sell to respondent at a net price of 21 to 27 per cent below the price at which products of like grade and quality were being sold to respondent's competitors.

The evidence of record reveals that any discrimination in the price of candy, gum, nuts, and other confectionary products will divert business from any manufacturer or jobber of such products who does not grant such price [fol. 519] discriminations to a manufacturer or jobber who does grant them. Such a condition is demonstrated beyond any doubt by respondent's refusal to buy in most instances except where it could induce and receive a discrimination in price.

The Commission has found from the evidence of record that the effect of price discriminations induced and received by respondent has been, and may be, substantially to lessen competition and tend to create a monopoly in the manufacture, sale, and purchase of candy, gum, nuts, confectionary products, or other packaged goods, suitable for use in coin-operated vending machines, and in the manufacture, development, acquisition, ownership, operation, leasing, licensing, or selling of automatic vending machines, suitable for vending such products; and to injure, destroy, or prevent competition between manufacturers and processors of the aforesaid products who granted respondent lower prices and those manufacturers and producers who did not grant such discriminatory prices, between respondent and vending-machine operators who did not receive the benefit of the lower prices received by respondent, between respondent and candy jobbers and wholesalers who did not receive the benefit of such discriminatory prices, and between respondent and other retailers of candy, gum, nuts, and other confectionary products who did not receive the benefit of the lower prices granted respondent, and between those manufacturers of automatic vending ma-

chines who supplied respondent and its distributors and those who did not supply them with such machines.

Respondent made no attempt to show that the price differentials and discriminations induced and received by it made only due allowance for differences in the cost of manufacture, sale, or delivery resulting in the differing methods or quantities in which candy, gum, nuts, or other confectionary products were sold or delivered to it. The statute places squarely on respondent the burden of showing that price differentials are thus justified. In *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, the court said:

"First, the general rule of statutory construction is that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of § 2(a). Secondly, § 2(b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices."

Certainly, the same burden rests upon one who is shown to have knowingly induced or received a discrimination in price in violation of subsection (f).

Respondent made no attempt to rebut the *prima facie* case herein established by showing that the discriminatory prices which it induced and received were granted in good faith to meet equally low prices at which merchandise of like grade and quality was being sold to its competitors. Here, again, Section 2(b) of the Clayton Act, as amended places the burden of making such a showing upon the person charged with a violation. In *F. T. C. v. Staley Mfg. Co., et al.*, 324 U. S. 746, the court stated:

"Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circum-

stances, which are 'peculiarly favorable' to price discrimination abuses. We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

In this proceeding the burden of such a showing rests upon respondent, and it is unlikely that such proof could be successfully adduced since the evidence clearly shows that officers, representatives, and employees of respondent knew that the discriminatory prices induced and received by respondent were below those prices at which merchandise of like grade and quality was being sold to its competitors by the same seller.

The inhibitions contained in the order to cease and desist issued herewith do no more than prohibit those acts, practices, and methods of respondent which are found to violate Section 3 of the Clayton Act and Section 2(f) of [fols. 521-556] said Act as amended by the Robinson-Patman Act, and are confined to those acts, practices, and methods alleged in the complaint. Other prohibitions contained in the order to which respondent agreed and urged by counsel in support of the complaint and an additional prohibition recommended by the trial examiner have been eliminated after due consideration by the Commission, either because the evidence of record fails to provide a basis for findings of fact in support thereof or because such prohibitions are not required by reason of the nature of the complaint or are without sound basis under the provisions of the statute under which this proceeding was initiated. Thus, the order adopted by the Commission is not as stringent in its terms or as broad in scope as the order to which respondent agreed but serves to more properly dispose of the issues raised by the pleadings and to more nearly meet the requirements of the statute.

Lowell B. Mason.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

No. 40239

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

STIPULATION—April 6, 1951

It is hereby stipulated by the attorneys for the respective parties hereto that the attached documents may be incorporated in the record herein and printed as designated by the petitioner.

This the 6th day of April, 1951.

L. A. Grayelle, Attorney for Petitioner; James W.  
Cassedy, Attorney for Respondent.

R

[fol. 557]. IN UNITED STATES COURT OF APPEALS  
STATEMENT PURSUANT TO RULE 10(b)

1. Caption of the proceedings below.

United States of America

Before Federal Trade Commission

Commissioners: James M. Meade, Chairman; William A. Ayres, Lowell B. Mason, John Carson.

Docket 4933

In the Matter of AUTOMATIC CANTEEN COMPANY OF AMERICA,  
a Corporation

[fol. 558] 2. Caption in the Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

No. 10239

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

3. The suit was commenced March 19, 1943.

4. The original parties were Federal Trade Commission, Complainant, vs. Automatic Canteen Company of America, a corporation. No additional parties have been added.

5. The Complaint was filed March 19, 1943.

June 10, 1943 a motion was filed asking for an extension of time in which to file an answer, which was granted to May 12, 1943.

The answer was filed May 11, 1943.

Defendant filed a motion to dismiss the complaint, August 4, 1947. The order of the Commission denying that motion to dismiss was made on January 6, 1948.

6. The defendant was not arrested, no bail was taken and no property attached or arrested.

7. The trial was had covering numerous hearings from and including June 24, 1946 to and including March 4, 1948.

8. The matter was heard before Trial Examiner Charles B. Bayly.

9. The findings as to the facts and conclusion by the Commission were issued on June 6, 1950.

10. The order to cease and desist was issued on June 6, 1950.

[fol. 559] IN THE UNITED STATES COURT OF APPEALS

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL  
TRADE COMMISSION—August 12, 1950

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit

Now comes the Automatic Canteen Company of America, by their attorneys, and petitions the court to review and set aside the order of the Federal Trade Commission issued on June 6, 1950, and in support thereof respectfully shows:

The Nature of the Proceedings as to Which Review or Enforcement Is Sought

1. Automatic Canteen Company of America is a corporation duly organized and existing under the laws of the State of Delaware and has its principal office and place of business in the City of Chicago, State of Illinois. It is engaged in the business of selling candy, gum and nuts purchased by it from many different producers thereof, to distributors who are independent contractors to be vended by its distributors to consumers, through vending machines leased from Automatic Canteen Company by its distributors for that purpose and for that purpose only.

2. Under date of March 19, 1943, the Federal Trade Commission, hereinafter called the "Commission", issued its complaint in a proceeding entitled "In the Matter of the Automatic Canteen Company of America", Docket No. 4933. The complaint contains two counts based upon different allegations and different theories.

3. Count I charges that certain conditions contained in the long-term franchise agreements between petitioner and

its 83 canteen distributors, who were not made parties to this proceeding, are unduly restrictive and in violation of Section 3 of the Clayton Act (Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. A., see. 14).

4. Count II charges that petitioner, as a *buyer* of candy gum and nuts, knowingly induced and received discriminatory prices in violation of subsection (f) of section 2 of [fol. 560] the Clayton Act, as amended by the Robinson-Patman Act (Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. A., see. 13).

5. Under date of May 11, 1943 petitioner filed its answer to the complaint denying the material allegations thereof.

6. Commencing on May 12, 1946 and terminating on June 9, 1949 hearings were had before a Trial Examiner designated by the Commission in the course of which evidence, both oral and documentary, was adduced on behalf of the Commission.

7. On August 4, 1947, after the Commission closed its case, petitioner filed a motion to dismiss both Counts of the complaint upon the grounds that:

(a) The Federal Trade Commission cannot, under section 3 of the Clayton Act, terminate and destroy the contractual rights of petitioner's distributors, created by valuable long-term franchise agreements, when said distributors are not parties to the proceedings, and

(b) The Commission has not proved a *prima facie* case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that petitioner, who was the purchaser, "knowingly induced or received" price differentials which made *more* "than due allowance for differences in the cost of manufacture, sales, or delivery resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

The motion to dismiss was denied by the Commission on January 6, 1948. Petitioner stood on its motion and did not present evidence or testimony other than cross-examination and a stipulation, signed by both parties, modifying and correcting certain rulings of the Trial Examiner.

8. On June 6, 1950 the Commission issued its "Findings as to the Facts and Conclusion", its "Order to Cease and

Desist", and an "Opinion by Commissioner Mason, Concurred in by Commissioners Ayres, Carson and Mead". This was served on this petitioner on June 14, 1950.

9. With respect to Count I, the Commission found and concluded that:

The acts and practices of the respondent (petitioner here) \* \* \* of entering into contracts with its various distributors for the leasing of vending machines and the purchase [fol. 561] of candy, gum, nuts, or other confectionary products to be sold through these same machines on the condition and with the agreement and understanding that such distributors should not lease, operate, or in any way use vending machines obtained from any other source than the respondent and that such distributors should not purchase for resale through said vending machines leased from the respondent any candy, gum, nuts, or other confectionary products, except such products as were sold to the distributor by the respondent, constitute a violation of section 3 of the (Clayton) Act. \* \* \*

10. With respect to Count II, the Commission found that:

Officials of respondent (petitioner here) knew that many of the prices paid by its competitors were higher than those which it sought to induce and did receive. This knowledge was based primarily on the common information that items purchased by respondent consisting of the one-cent and five-cent variety goods purchased were standard price items. Sales by most suppliers were based on that standard and considered to be common trade information. Variations from the standard price were brought about only by means of discounts, free deals, or other promotional aids made available by manufacturers and suppliers.

Respondent used various methods to induce its suppliers to grant discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times respondent refused to buy unless the price to it was reduced below

prices at which the particular supplier sold the same merchandise to others. In other instances respondent sought to explain to the prospective supplier that certain alleged savings would accrue to the supplier in selling to respondent or that certain elements of the supplier's cost could be eliminated, which would in respondent's opinion, justify a lower price.

From this the Commission concluded that petitioner knowingly induced and received discriminations in the prices of candy, gum and nuts, purchased by it from various manufacturers and processors, in violation of section 2(f) [fol. 562] of the Clayton Act, as amended by the Robinson-Patman Act.

11. The Commission made no attempt to show, and it failed to find, that petitioner knowingly induced or received discriminations in price prohibited by said Act, that is, discriminations that reflected more than due allowance for differences in the cost of manufacture, sales or delivery resulting from the differing methods or quantities in which candy, gum, or nuts were sold or delivered to it. The Commission took the position that the mere receipt or induction of price differentials established a *prima facie* case against a buyer, that the burden of justifying such differentials on the basis of sellers' differences in costs then shifted to petitioner. It said that "The statute places squarely on respondent (petitioner here) the burden of showing that price differentials are thus 'justified'; in other words, that the provisions of section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, relating to *prima facie* proof, apply to the buyer as well as to the seller.

12. The Commission's "Findings as to the Facts and Conclusion" are, in material and controlling respects, without support in evidence, and are contrary to such evidence.

13. The Commission's order sustained the charges of both counts of the complaint. With respect to the charges of Count I, the Commission ordered petitioner to cease and desist from enforcing or carrying out contracts on the condition that the lessee

1. Shall not acquire, manufacture, own, hold, locate, use, operate, lease, or otherwise deal with any automatic vending

machine which is not licensed, leased, purchased, or otherwise acquired from respondent or from some source authorized by it.

2. Shall not offer to sell, sell, or cause to permit to be sold any candy, gum, nuts, or other confectionery products purchased from respondent other than by means of automatic vending machines leased or purchased from it.

3. Shall not buy for resale, deal with, use, or permit to be used, in automatic vending machines leased or purchased from respondent, the confectionery products of any seller or supplier other than respondent.

4. Shall order and purchase exclusively from respondent all confectionery products offered for sale by means of automatic vending machines leased or purchased from respondents.

[fol. 563] Provided, however, that nothing contained in the preceding paragraphs numbered 1 through 4 shall be construed as prohibiting respondent from entering into any contract, agreement, or understanding with any lessee, licensee, purchaser, or distributor of its automatic vending machines which provides for payment to the respondent of such compensation as it may desire for the use of its automatic vending machines, for services rendered, for protection of quality and salability of products sold through its said vending machines, or provides for protection of respondent's franchise territories and distribution, of its good will and trade name, of its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public, when none of such provisions are in conflict with the prohibition set forth herein:

14. With respect to the charges of Count II, the Commission ordered petitioner to cease and desist from:

Knowingly inducing or knowingly receiving or accepting any discrimination in the price of such products, by directly or indirectly inducing, receiving or accepting a net price from any seller known by respondent or its representatives to be below the net price at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing

with other customers of the seller; provided, however, that the foregoing shall not be construed to preclude the respondent from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are by such seller sold or delivered to respondent.

For the purpose of determining "net price" \* \* \* there shall be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are affected.

15. Paragraphs 3 and 4 of the order of the Commission set forth above, under item 13 on Pages 5 and 6 of this petition, are contrary to law and impose upon petitioner terms which the law does not sustain or justify in the requirement there set up that petitioner cease and desist from enforcing or carrying out contracts on the condition that the lessees (meaning the distributor) shall not use or [fol. 564] permit to be used in automatic vending machines leased from respondent (meaning the petitioner here), the confectionery products of any seller or supplier other than respondent (meaning the petitioner here) or that the lessee (meaning the distributor) shall order and purchase exclusively from respondent (meaning petitioner here) all confectionery products offered for sale by means of automatic vending machines leased from respondent (meaning the petitioner here).

16. The enforcement of said order would (a) require cancellation of valuable contract rights of persons not parties to the proceeding, and (b) place upon petitioner an impossible burden of proof, viz., proof of the seller's cost justifications.

17. Said order to cease and desist is not supported by the record and is beyond the jurisdiction of the Commission.

#### The Facts and Statutes Upon Which Venue Is Placed

18. The statute under which this court has jurisdiction is section 11 of the Clayton Act (Act of October 15, 1914; 38 Stat. 734; 15 U. S. C. A., sec. 21).

19. The acts and practices of the petitioner complained of in said complaint and included within the scope of said cease and desist order occurred within the jurisdiction of this court, and the principal office and place of business of petitioner is located in this circuit.

### The Relief Prayer

The petitioner prays:

1. That a copy of this petition be served by the clerk of this court upon the Federal Trade Commission.
2. That this court review and set aside the Commission's "Findings as to the Facts and Conclusion", its "Order to Cease and Desist", and its "Opinion".
3. That this court grant such other and further relief as it may deem proper.

### The Points On Which Petitioner Intends To Rely

(1) The Commission exceeded its authority under the law in ordering the petitioner to cease and desist from enforcing and carrying out the provisions or conditions in its franchise lease or contract that lessee (the distributor) [fol. 565] should not use or permit to be used in automatic vending machines leased from petitioner the confectionery products of any seller or supplier other than petitioner; and that the Commission exceeded its authority under the law in ordering the petitioner to cease and desist from enforcing or carrying out the provision or condition in its franchise lease or contract that the distributor (referred to in the order as lessee) should order and purchase exclusively from petitioner all confectionery products offered for resale by means of automatic vending machines leased from petitioner.

(2) The Commission erred in not making said canteen distributors parties respondent.

(3) The provisions of the franchise agreements are so interrelated that the alleged restrictive conditions cannot be stricken therefrom without destroying their mutuality.

(4) The Commission cannot, under section 3 of the Clayton Act, terminate and destroy valuable contractual rights of said distributors who were not parties to the proceeding.

(5) The provisions of section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, relating to a *prima facie* case, do not apply in a proceeding against the buyer under section 2(f) in such manner as to shift to the buyer the burden of showing the sellers' cost justifications;

(6) If section 2 (b) does apply to the buyer, then the double presumption thus created, namely, (1) that the lower prices granted petitioner by some of its suppliers were not justified by the sellers' cost differences, and (2) that petitioner had knowledge thereof, constitutes a denial of due process.

(7) The decision of the Commission that petitioner, a buyer, has the burden of justifying the sellers' price differentials on a cost basis is unreasonable and oppressive in that petitioner does not have access to the books and records of its many suppliers.

(8) The Commission's Findings are not supported by the evidence insofar as they find that petitioner had knowledge that the prices actually paid by its competitors (that is, the net prices) were higher than those which petitioner induced or received.

(9) The Commission's Findings are not supported by the evidence insofar as they find that petitioner informed prospective suppliers of the prices which would be acceptable "without consideration or inquiry as to whether such supplier could justify such a price on a cost basis".

[fol. 565] (10) The Commission's order to cease and desist deals with "net price" whereas there is no evidence in the record that petitioner had knowledge of the net price at which products of like grade and quality were being sold to its competitors.

Dated August 12, 1950.

Automatic Canteen Company of America, by L. A. Gravelle, One of Its Attorneys,

L. A. Gravelle and Edward F. Howrey, Shoreham Building, Washington 5, D. C.; J. Arthur Friedland, Emil N. Levin, Elmer M. Leesman, 763 First National Bank Building, Chicago, Illinois, Attorneys for Petitioner.

[File endorsement omitted.]

## [fol. 567] IN UNITED STATES COURT OF APPEALS

## STIPULATION—January 5, 1951

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that petitioner will not challenge any part of the Commission's findings herein on the ground they are not supported by the evidence other than the findings of the Commission challenged under points 8, 9 and 10 of "The Points On Which Petitioner Intends To Rely" on pages 8-10 inclusive of the Petition for Review.

It is further agreed that this stipulation may be made a part of the record on appeal in this or any further proceeding.

(S.) L. A. Gravelle, Edward F. Howrey, Shoreham Building, Washington, D.C. (S.) J. Arthur Friedlund, Emil N. Levin, Elmer M. Leesman, 763 First National Bank Bldg., Chicago, Illinois, Attorneys for Petitioner. (S.) James W. Cassidy, Assistant General Counsel and Attorney for Respondent, Federal Trade Commission, Pennsylvania at 6th Street, N. W., Washington 25, D. C.

Dated: January 5, 1951.

## [fol. 568] IN UNITED STATES COURT OF APPEALS

## STIPULATION—March 15, 1951

It Is Herby Stipulated by and between the parties to the above-entitled-matter, through their respective attorneys, that counsel for the respective parties may refer in their briefs and on oral argument to the record filed in this Court, including any part thereof which has not been printed.

(S.) L. A. Gravelle, Edward F. Howrey, Attorneys for Petitioner. (S.) James W. Cassidy, Assistant General Counsel, Federal Trade Commission.

March 15, 1951.

## IN UNITED STATES COURT OF APPEALS

ORDER RE MATTERS NOT PRINTED—March 22, 1951

Pursuant to stipulation of counsel, it is ordered that leave be, and the same is hereby, granted to counsel for the respective parties to refer in their briefs and on oral argument to the record filed in this Court, including any part thereof which has not been printed.

[fols. 569-570] Clerk's Certificate to foregoing Transcript omitted in printing.

## [fol. 571] IN UNITED STATES COURT OF APPEALS

Argument and Submission (Omitted in Printing)

[fol. 572] IN UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT, OCTOBER TERM, 1951, JANUARY SESSION,  
1952

No. 10239

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of an Order to Cease and Desist Issued  
by the Federal Trade Commission.

OPINION—Filed January 18, 1952

Before Kerner, Duffy, and Lindley, Circuit Judges

KERNER, Circuit Judge:

Petitioner is engaged in the two-fold business of developing and leasing automatic vending machines and in the purchase of candy, gum, nuts and other confectionery products for resale to its distributors who in turn distribute them to

the public by means of the vending machines. It seeks review of an order of the Federal Trade Commission directing it to cease and desist from certain discriminatory practices related to both aspects of its business. The Federal Trade Commission, by cross petition, seeks affirmance and enforcement of the order.

The complaint was in two counts. Count I charged violation of § 3 of the Clayton Act, 15 U. S. C. § 14, by the use of exclusive-dealing contracts in the leasing of the vending machines. Count II charged violation of § 2(f) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13(f), by knowingly inducing and knowingly receiving price discriminations in connection with its purchases of gum, nuts, and confectionery products in the [fol. 573] course of commerce. Petitioner's only answer was a general denial of any violation of the Act as charged in either count. At the close of the Commission's case it moved to dismiss the complaint and, upon denial of its motion, it offered no evidence in response.

The Commission found that petitioner had been for nearly twenty years engaged in purchasing nationally known candy and other products of standard weight and quality, from many manufacturers and producers throughout the country and in reselling them, principally as a wholesaler, to lessees of its automatic, coin-operated vending machines. It had also been engaged in the development of such machines, called canteens, although it did not manufacture them. Its system was to lease the machines to "distributors" who became its sole customers for the confectionery products in which it dealt. The machines were generally located in offices, factories, and other commercial establishments. As of January 1946, it owned 230,150 machines which were leased to 83 distributors located in 112 separate territories in 33 states and the District of Columbia. Under the terms of the lease contracts the distributors bound themselves not to use any vending machines other than those of petitioner during the term of the contract and for five years after termination, not to sell in the machines any products other than those purchased from petitioner, and not to sell any such products except in the machines.

The Commission found that the effect of petitioner's ex-

clusive-dealing contracts had been to substantially lessen competition or tend to create a monopoly in both lines of commerce in which it was engaged, namely, the sale and purchase of packaged merchandise suitable for distribution in automatic vending machines, and the dealing in the machines. Thus competition was substantially lessened between petitioner's suppliers and their competitors who were unable to sell to petitioner, between petitioner and its competitors, and between its distributors and their competitors, and this, in turn, tended to create a monopoly in petitioner, its distributors, and certain manufacturers and processors. The contracts had a similar effect as between petitioner and vending machine manufacturers.

The Commission found that petitioner had knowingly induced and knowingly received lower prices from its suppliers than the prices paid by its competitors for similar products; that the prices paid by petitioner were from 1.2% to 33% lower than those paid by its competitors; and [fol. 574] that it received such differentials from about 80 of its 115 suppliers. Petitioner made no attempt to show cost justification as to any of these differentials. The Commission further found that petitioner had attained a dominant position in the sale and distribution of the products it deals in through and by means of the vending machines, with sales through the machines expanding from \$1,937,117 in 1936 to \$14,253,547 in 1944, which expansion the Commission attributed largely to its exclusive-dealing contracts and its reception of lower prices in the purchase of its goods.

The Commission concluded that petitioner was guilty of the violation charged and accordingly entered its order that petitioner cease and desist:

1. From entering into, enforcing or continuing in operation the exclusive-dealing contracts described, "Provided, however, that nothing contained in the preceding paragraphs \*\* shall be construed as prohibiting respondent from entering into any contract \*\* with any lessee \*\* which provides for payment to the respondent of such compensation as it may desire for the use of its automatic vending machines, \*\* for protection of quality and salability of products sold

through its said vending machines, or provides for protection of respondent's franchise territories and distribution, of its good will and trade name, of its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public; when none of such provisions are in conflict with the prohibitions set forth herein."

2. In connection with the purchase of confectionery products, gum and nuts, "From Knowingly inducing or knowingly receiving \*\* any discrimination in the price of such products, by directly or indirectly inducing [or] receiving \*\* a net price from any seller known by respondent or its representatives to be below the net price at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing with other customers of the seller; provided, however, that the foregoing shall not be construed to preclude the respondent from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said commodities are by such seller sold or delivered to respondent."

Petitioner challenges the order as to Count I on the grounds: That it is defective for failure to join petitioner's lessees as parties, thus destroying valuable contractual rights in their absence; and that the condition that the lessees use only petitioner's merchandise in the canteens is a lawful one.

Petitioner analyzes the offending contracts as providing for (1) nominal rental, (2) exclusive territory for distributor, (3) exclusive use of petitioner's canteens, and (4) exclusive purchases of merchandise from petitioner for use in the canteens, and it contends that destruction of (3 and 4) destroys the mutuality of the contracts, thereby destroying the contracts and thus stripping the lessees of valuable contract rights and injuriously affecting them in their absence. On this point petitioner relies on two de-

cisions of this court, *Fruit Growers' Express Inc. v. Federal Trade Commission*, 274 Fed. 205 (certiorari granted, 257 U. S. 627, and dismissed by stipulation on motion of the Solicitor General, 261 U. S. 629), and *Sinclair Refining Co. v. Federal Trade Commission*, 276 Fed. 686; affirmed, 261 U. S. 463. While the cases do appear to furnish authority for petitioner's contention on this point, we do not feel impelled to follow them in view of the difference in the factors which appear to have impressed this court in annulling the orders there involved. Moreover, we note that petitioner's analysis omits reference to other important provisions of the contract which favor the lessor, namely, the guarantee by the lessee of an average monthly sales volume comparable to the national average sales volume for the same month, and the right of the lessor to terminate the contract upon default by the lessee in any condition therein, and a covenant that, upon termination of the lease, the lessee shall not engage in the distribution of any merchandise in the territory by means of vending machines for a period of five years. Under the rule in *United Shoe Machinery Corp. v. U. S.*, 258 U. S. 451, 456, the lessees were not indispensable or even necessary parties to the proceedings. "The covenants enjoined were inserted for the benefit of the lessor, and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction." Petitioner seeks to distinguish this case on the basis of the total absence of any mutuality of consideration. We find no merit in this attempted distinction. And we note that this case was decided after the two decisions of this court, hence not available to it on the question of parties.

With respect to the asserted legality of the condition, petitioner again refers to the *Sinclair* case as affirmed, 261 U. S. 463. However, we think the distinction between the elements of the contract considered controlling by the Supreme Court there (see 261 U. S. 463 at 474) and those of the contract here involved (including those omitted by petitioner) make it better authority for upholding the order than for setting it aside. See also *Standard Oil Co. v. United States*, 337 U. S. 293; *International Salt Co. v. United States*, 332 U. S. 392. And there certainly can be no

question on this record but that the actual effect of the conditions was to foreclose competitors from a substantial share of the market as to both lines of petitioner's business. As the Commission pointed out, with respect to the products distributed, competitive jobbers and wholesalers cannot sell to these lessees who operate over 200,000 of petitioner's vending machines, and manufacturers who do not sell to petitioner but might sell to its lessees are also shut out of the competition with petitioner. This constitutes a very substantial interference with competition. Moreover, we are convinced that this portion of the order does not constitute an interference with petitioner's rights in view of the fact that its provisos furnish ample safeguard for the protection of petitioner's goodwill and right to compensation.

We are informed by counsel that the petition to review the Count II portion of the order presents the first court test of a buyer's liability under §2(f) of the Act although there have been numerous proceedings thereunder before the Commission. The principal question raised relates to the burden of proof. Petitioner contends that the Robinson-Patman Act which permits price differentials based on cost differences does not require a buyer to prove his seller's cost justification, and if it be construed to do so, such construction imposes so heavy a burden on the buyer as to amount to a deprivation of due process as well as eliminating cost justification from the Act.

For a proper understanding of the issues it is necessary to read subsections (a), (b), and (f) of §2 together. [fol. 577] Section 2(a) makes it unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition, provided that nothing contained therein shall prevent differentials which make only due allowance for differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in sale or delivery.

Section 2(b) provides that upon proof of a discrimination the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged.

with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13 \* \* \* of the title shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price \* \* \* to any purchaser \* \* \* was made in good faith to meet an equally low price of a competitor \* \* \*."

Section 2(f) provides that it shall be unlawful for any person "engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

We find no basis in the language of the three subsections for a distinction in their scope as between buyers and sellers. It has now been established that in a proceeding under the Act, once the Commission has established the fact of a price differential in the sale of like products in commerce tending to lessen competition or create a monopoly, the burden rests upon the seller of such products to justify the discrimination by the means provided in subsection (a) or (b). In other words, §2(a) prohibits the discriminations unless they can be justified, and as the Court pointed out in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 44, "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of §2(a)." Petitioner concedes, as it must, that "in a proceeding against a seller under §2(a), the seller has the burden of proof to show that he comes within the proviso." But §2(f) makes it equally unlawful for a buyer to knowingly induce or receive any discrimination prohibited by the section, and we see no escape from the conclusion that this places precisely the same burden of proving cost justification upon the buyer, once the Commission establishes *knowing* inducement or receipt of a price discrimination otherwise illegal. The two sections are in all respects parallel. \* \* \* The discrimination in price which it is unlawful for a seller to grant under Section 2(a) is the same discrimination in price which it is unlawful for

a buyer knowingly to receive under Section 2(f) \*\*\*  
Austin, Price Discrimination and Related Problems Under  
the Robinson-Patman Act, American Law Institute (1950)  
pp. 150, 151.

This construction of the section is further borne out by the language of subsection (b) imposing the burden of rebutting the *prima facie* case by showing justification, not upon the *seller*, but upon the *person charged with violation of the section*, although it further provides that the *seller* may rebut by showing that the lower price was made in good faith to meet a competitive low price. Petitioner cannot say that this apparently careful choice of language was meaningless, as it would be under its theory. Hence we cannot agree that in order to sustain its charges under §2(f) the Commission was required to prove the absence of cost justification.

Petitioner further contends that such a construction of the section constitutes a denial of due process by imposing an impossible burden of proof upon it. However, we think that defense is not available to petitioner on the record in this case. Its only answer to the charge was a general denial and, at the close of the Commission's case, a motion to dismiss. It thus laid no foundation for its assertion before this court that cost justification was impossible of proof by a buyer and that a construction of §2(f) requiring a buyer to sustain the burden of such proof would be a violation of due process. It is not enough just to assert that proof is not available, or is impossible. *Tennessee Consolidated Coal Co. v. Comm.*, 117 F.2d 452. As the Court said in *Austinon Mfg. Co. v. Davis*, 301 U. S. 337, 352, 353, "Impossibility of proof may not be assumed. \*\*\* Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the facts." And when petitioner chose not to introduce any evidence as to the facts it may not now say that the defense allowed by the Act is useless or impossible of proof. It is no doubt true that it is more difficult for a [fol. 579] buyer to establish his seller's cost justification than it is for the seller from whom he bought. But we cannot say that it is unreasonable or arbitrary to expect a buyer who induces or knows that he is receiving prices sub-

stantially lower than his competitors to make some good faith effort to ascertain that such lower prices are justified by lower costs in the sales to him. Nor can we assume that the Commission will be so arbitrary or unreasonable as to the quantum of proof required of the buyer in a proceeding under §2(f) as to deprive him of due process.

Petitioner also contends that two findings of the Commission are not supported by substantial evidence: (1) That it informed prospective suppliers of the prices and terms which would be acceptable to it without consideration of costs; and (2) that it knew that many of the prices paid by competitors were higher than those it sought to induce and did receive in so far as that meant knowledge of *net* prices actually paid by competitors. We have examined the record and find that it supports both findings.

One further question remains, raised by petitioner for the first time in its reply brief, whether the Commission is entitled to an enforcement order on cross petition to petitioner's petition to review, in the absence of a showing that violation of the order has occurred or is imminent. The Court of Appeals for the Second Circuit recently decided this question adversely to the Commission. *Rubberoid Co. v. Federal Trade Commission*, 191 F. 2d 294. We regret that we cannot agree with the reasoning and conclusion of that eminent court in denying enforcement. We are in accord with the conclusion of Judge Clark, dissenting, and the reasons stated by him, that the court of appeals does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission. We deem it unnecessary to restate or amplify those reasons.

Order affirmed; enforcement granted.

[fols. 580-582]. In UNITED STATES COURT OF APPEALS

January 18, 1952.

Before: Hon. Otto Kerner, Circuit Judge; Hon. F. Ryan Duffy, Circuit Judge; Hon. Walter C. Lindley, Circuit Judge.

10239.

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent.

Petition for Review of an Order to Cease and Desist Entered by the Federal Trade Commission.

JUDGMENT—January 18, 1952

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Federal Trade Commission entered in this cause on June 6, 1950, be affirmed, and that enforcement of the said order be granted.

[fol. 583]. [File endorsement omitted].

In UNITED STATES COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING BY PETITIONER—January 30, 1952

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioner herein, Automatic Canteen Company of America, respectfully presents herewith its Petition for Rehearing in the above entitled cause and for ground thereof, respectfully submits to the Court that in the opinion of the

Court herein, it has overlooked or misapprehended three very vital considerations: one, a consideration in respect of Petitioner's complaint against the first part of the Commission's order (Tr. 512; see page 3 of the Court's opinion,—the opinion of the Court fails to give enough of the [fol. 584] Commission's order to enable one to envisage properly this point of the petition); and two and three, considerations in respect of Petitioner's complaint against the second part of the Commission's order. (Tr. 513; see the bottom of page 3 and the top of page 4 of the Court's opinion.)

ONE—The first consideration which Petitioner respectfully submits the Court has overlooked or misapprehended is, that Petitioner does not complain of the first part of the Commission's order, except only in one particular. As already noted, the opinion of the Court does not set forth the Commission's order sufficiently for one to perceive from what the opinion has set forth, just what Petitioner's complaint is against the first part of the Commission's order. The Court will observe that that part of the Commission's order, orders Petitioner to desist from doing four things. (Tr. 512, 513.) Of those, the Petitioner complained and complains only of the fourth, viz., that it should desist from the condition that the licensee "4. Shall order and purchase exclusively from Respondent all confectionery products offered for sale by means of automatic vending machines leased \*\*\* from Respondent." Petitioner has not complained and does not complain even of that part of the order insofar as it concerns vending machines, if any, that might be *purchased* from Petitioner, but it does complain of that part of the order and only of that part of the order relative to machines under *nominal lease* from the Petitioner. If the Court will examine Petitioner's petition for review (Tr. 559-566), the Court will observe that the points on which Petitioner relies are [fol. 585] set forth in that petition (see bottom of page 564 and top of page 565 of the transcript), and the Court will observe that the first of those points makes it plain that Petitioner's sole complaint against the first part of the Commission's order is strictly confined to that part of the order which would permit the licensee to sell from the ma-

chines furnished by the Petitioner goods other than those which the Petitioner furnished. That point is set forth in Petitioner's brief as point number 9 on page 6 of Petitioner's brief. It appears in the propositions relied upon in Petitioner's brief as propositions numbered 17 to 19 inclusive, at pages 41 and 12 of Petitioner's brief, and it appears in the argument as Part VII at pages 68 to 74 of Petitioner's brief.

That Petitioner has thus complained of only that portion of the first part of the Commission's order, it is most respectfully urged, is not plain from the Court's opinion, and that Petitioner is entitled thus to complain of only that part of the order and that thereby only that part of the order is in issue in his cause necessarily appears from the case of *Radio Manufacturing Company v. Hazeltine Research* (1950), 339 U. S. 827 at pages 834 and 835, *second*, 70 S. Ct. 894 at page 898.

It is respectfully submitted that there is no answer to the point that Petitioner in the business of selling candy and similar merchandise by means of these vending machines, which it supplies, is entitled to insist that only its candy and products or the products furnished, and approved by it be vended through those machines. For it [fol. 586] cannot be disputed that the business of Petitioner is that of selling candy, gum and nuts and its leasing of machines is solely incident to and to furnish a vehicle for its sale of candy, gum and nuts. That is manifest from the record. That is pointed out in Petitioner's brief (see the bottom of page 73 and top of page 74 thereof), and is apparent from the way in which the business came about from the fact that up to the time Petitioner started its business, the vending machine business was an unsavory one and one viewed with suspicion (Tr. 28, 299), and Petitioner conceived a great opportunity to make the business an honest one by selling a fresh, good-sized candy bar in honest machines (Tr. 28, 299), and thereby acquired a reputation for its machines, so-called "Canteens." (Tr. 28, 29, 31, 38, 47, 299, 300.) And it likewise cannot be disputed that the system of charging rental for the machines was not by way of deriving any revenue or making any profit from the rental (Tr. 40, 306); but was to prevent cap-

italization on the name "Canteen" (Tr. 40), and amounted to no more than to amortize the cost of equipment over a period of years. (Tr. 306). Even the complaint which the Commission filed against Petitioner, itself shows that these machines are leased for a nominal rental only and that the Petitioner derived little or no profit from their leasing, Petitioner's principal source of profit being derived from the sale of candy through those machines. (Tr. 5.). The only authority that has even been suggested in opposition to this point one, is the case of *International Salt Company v. United States*, 332 U. S. 392, 297, 398, [fol. 587] 68 S. Ct. 12, 16. The Court will recall that Judge Duffy mentioned that case on oral argument of the case at bar. As then pointed out to Judge Duffy, that case is not applicable because there the salt was a part of the operation of the machines. *The machines were not supplied for use in rendering the supplier's merchandise. There the machines were supplied for the use by the one to whom they were supplied in the manufacture of canned goods.* In the operation of the machines and in the manufacture of those goods, salt was used and the condition which was held invalid in that case was that that salt should be purchased from the supplier of the machines. The Supreme Court pointed out that the use of any particular salt did not affect the operation of the machines and that, therefore, that condition was improper. In other words, the case thus presented a situation analogous to that where a patentee sought to make it a condition to the licensee's use of a machine, that he purchase parts for the machine only from the supplier of the machine, which was held improper. In other words, in all those cases in which a patentee seeks to limit the use of a machine by requiring that parts necessary to the operation of the machine be purchased from the supplier, the conditions are improper because the sale of the machine is the principal transaction and the sale of the parts incidental thereto. The situation presented on the record now before the Court, on the contrary, presents a situation where the principal objective of the supplier of the machines, is the sale of candy through them and the [fol. 588] machines are merely incidental to the supplier's business of selling candy, and that is the reason why such

cases as *Sinclair Refining Company v. F. T. C.*, 261 U. S. 463 and *Clare v. Ice Cream Cabinet Company*, 11 N. J. Misc. 386, 166 Atl. 722, are applicable and such cases as *United Shoe Machinery Corporation v. United States*, 258 U. S. 451, and *International Salt Company v. United States*, 332 U. S. 392, are not applicable. Indeed, that is made clear in the case of *International Business Machines Corp. v. United States* (1936), 298 U. S. 131, 135, 56 S. Ct. 701, 703, where the Supreme Court said:

"A different question is presented from that in the *Sinclair* case where a wholesale distributor of gasoline leased gasoline pumps to retail dealers with the stipulation that they should not be used for the pumping of gasoline of lessor's competitors. As the only use made of the gasoline was to sell it [*i.e.*, it was not a part of the operation of the machine], and as there was no restraint upon the purchase and sale of competing gasoline, there was no violation of the Clayton Act."

One must bear in mind that Petitioner is foregoing any adherence to that part of its contract by which it undertook to restrict distributors to the sale of its goods, and is standing solely upon that portion of the contract by which it was entitled to insist upon its "Canteens" being used only in the sale of its goods. The force of Petitioner's point One is also apparent from the language in the comparatively recent decision in *Standard Oil Company of California v. United States* (1949), 337 U. S. 293, 303, 69 S. Ct. 1051, 1057, where the following language appears:

[fol. 589] "The *Sinclair* case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks and evidently did not otherwise control their supply. \*\*\*"

"Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he

chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his need."

That is true of the situation in the case at bar. Petitioner having acquired a reputation of the sale of good, wholesome candy and for cleanliness in its "Canteens" and their maintenance by it, actually prevents a fraud upon the public by insisting that only its goods be vended in its "Canteens." Its distributors, if they so wish, may vend candy supplied by others than Petitioner whether in vending machines or otherwise,—only they may not use Petitioner's machines to vend candy purchased from others. Petitioner did not and does not control the supply of vending machines. It bought them on the market just as a milk company would buy bottles for the sale of its milk or a candy company might buy boxes for the sale of its candy. True, it has dressed its Canteens up to suit the sale of its particular product; but that is no reason for [fol. 590] requiring it to permit others to use its machines for the sale of other products than its own any more so than a candy company selling its candy in boxes of its particular design must permit sellers to use those boxes for the sale of candy other than its own.

It is again respectfully submitted that the Court has utterly failed to react to this point in its opinion.

Two—Of consideration two and three which it is respectfully submitted the Court has overlooked or misapprehended in its opinion relative to the second part of the Commission's order, consideration two is this:

Particular attention was called on the reply in the oral argument of the case at bar to the language of subsection 2(b) of the statute, and how that subsection was not followed in the order which the Commission made. The opinion of the Court sets forth this subsection at the bot-

tom of page 6 and the top of page 7 of the opinion. It is the sole basis for the Commission's contention that the burden of proof was upon the Petitioner in this case to show that it did not "knowingly induce or receive a discrimination in price which is prohibited" by the section.

The Court will note that this subsection 4(b) of section 2 (see bottom of page 6 of the Court's opinion) provides that upon proof of a discrimination in price between different purchasers, the burden of rebutting by showing justification shall be upon the person charged with violation of the section and that unless the justification shall be shown, the Commission is authorized to issue an order terminating the discrimination.

[fol. 591] Both, because this statutory provision undertakes to change the common law rule and also because it tends to fix a penalty, the provision must be strictly construed. At any rate, its language cannot be extended. All that it says, and, therefore, all that it can mean is that, discrimination being shown, the burden of showing justification is on the person charged with violating the Act, and, that, unless that person affirmatively shows justification, the Commission may issue an order terminating the discrimination.

But that is not the order which the Commission issued. As already noted, the order appears at page 513 of the transcript. It is forthwith to cease and desist from "knowingly inducing or knowingly receiving or accepting any discrimination in the price," etc. Justification not having been affirmatively shown, the power of the Commission as delimited by subsection 2(b) itself, is confined to the issuance of an order terminating the discrimination. But that was not the order that was entered. (See Tr. 513.) Based upon the presumption authorized by subsection 2(b) in question, the extent of the power of the Commission was to issue an order terminating the discrimination. Having relied, as the Commission has, entirely upon proof of discrimination and absence of proof of justification, its order was expressly confined to an order terminating the discrimination. That, it is respectfully submitted, the Court has entirely overlooked. Yet that was specifically pointed out to the Court in the reply made on oral argument.

Three—But that is not all. Subsection 2(b) as already [fol. 592] mentioned, is the sole basis for departing from the common law rule, under which the Commission would have had to prove that Petitioner knowingly induced or received a discrimination in ~~not~~ prohibited by the section. For the sake of this third point, it may well be admitted *arguendo* (but in no sense conceded as a matter of fact) that there was proof,—not merely a presumption,—of discrimination. And for the sake of the point it may also be conceded that there was no affirmative proof of justification. But it stands plain on the record in this case at bar, that there was no proof of knowledge on the part of the Petitioner of lack of justification. In other words, there was no proof that Petitioner knowingly induced or received an unjustified discrimination and however much in fact it might be said there was no justification for the discrimination, it is equally plain that there was no proof that the Petitioner knew there was no justification for the discrimination. So that to sustain the order of the Commission here by which it found [as it must have in order to come within subsection 2(f)], that Petitioner knowingly induced or received a discrimination, the Act must have placed upon the Petitioner,—not merely the burden of showing there was no discrimination, and not merely the burden of showing that there was no such justification,—but also the burden of showing that it did not knowingly induce or receive a discrimination which was not justified by the cost differentials mentioned in the statute. *For the offense of subsection 2(f) is, not merely that of knowingly inducing or receiving a discrimination, but of knowingly inducing or receiving a discrimination which is not justified in the manner provided in subsection 2(a).*

There having been no proof that Petitioner knew that there was no such justification, in order to sustain the finding and order of the Commission, the Commission must be entitled to rely upon a presumption that there was knowledge of the absence of such justification. Nowhere in the Act is there any basis for the Commission's reliance upon a presumption of such knowledge. Subsection 2(b) plainly makes no such presumption, for the sole presumption it makes is that of discrimination and of lack

of justification. Nowhere does it or any other subsection of the Act make any presumption of knowledge thereof.

It is no answer to say that there is a burden upon the Petitioner to prove the provisos in subsection 2(a). The offense with which the Petitioner is charged is in subsection 2(f), and subsection 2(i) specifically defines the offense as one of *knowingly inducing or receiving a discrimination "which is prohibited by this section."* In determining the character of the defense which is thereby described, provisos in the section cannot be ignored, for they are part of the description of the offense. *Austin v. United States* (1894), 155 U. S. 417, 431; 15 S. Ct. 167 at page 173; *Lawrence Oil Corp v. Metcalfe* (1931), 241 Ky. 353, 358, 43 S. W. (2d) 986, 988; *Gasque, Inc. v. Nates* (1939), 191 S. Ct. 271, 290, 2 S. E. (2d) 36, 44; *Case v. Pinnick* (1939), 186 Okla. 217, 219, 97 Pae. (2d) 58, 60; *American Air Lines v. Civil Aeronautics Board* (1949, 7th), 178 Fed. (2d) 903 at page 906. That point is actually made in the case of *Sutton [sol. 594] v. United States* (1946, 5th), 157 Fed. (2d) 661 at pages 665 and 666, where it is said:

\*\*\* \* \* but if the exception itself is incorporated in the definition of the offense so that the elements of the crime are not fully stated without the exception, then it must be negatived."

That is precisely the situation presented by the case at bar in subsection 2(f), where the offense of which Petitioner is accused by the Commission is described as knowingly to induce or receive a discrimination in price which is prohibited by section 2.

In short, Judge Lindley's quotation from the case of *Case v. Hart* (1922), 260 U. S. 427, 435, 43 S. Ct. 154, 157, which he makes in the case of *American Air Lines v. Civil Aeronautics Board*, 178 Fed. (2d) 903, 906, above cited is most apt, thus: "If possible, the Act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law."

For the reasons above assigned herein, it is therefore respectfully submitted that counsel for Petitioner were not only fully justified in insisting upon proof of knowledge,

by the Petitioner of lack of justification for the discrimination, but would have been derelict in their duty to their client had they not insisted as they did on the hearing before the Commission upon the Commission proving a knowledge thereof by it, and that neither Petitioner nor its counsel should be penalized for insistence upon compliance [fol. 595-596] with the plain requirements of that Act, as it is respectfully submitted would be the result were the order of the Commission herein to be sustained; and this Petition is therefore respectfully addressed to the Court with the confidence that the Court will address itself to the three considerations plainly overlooked by the Court herein before the Court closes this case against the Petitioner.

Respectfully submitted, Edward F. Howrey, L. A. Gravelle, Harold F. Baker, J. Arthur Friedlund, Emil N. Levin, Elmer M. Leesman, Attorneys for Petitioner.

[fol. 597] IN UNITED STATES COURT OF APPEALS

¶ [Title omitted]

MOTION OF PETITIONER, AUTOMATIC CANTEEN COMPANY OF AMERICA, FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE—  
Filed February 8, 1952

Petitioner moves the court, under Section 11 of the Clayton Act (15 U. S. C. A. Sec. 21) for leave to adduce additional evidence to show that if the Robinson-Patman Act requires petitioner, a buyer, to prove its \$0 to 100 sellers' cost justifications, the statute imposes so heavy a burden on it as to amount to a deprivation of due process because such proof is not available, or is impossible.

Such additional evidence is material, in that, this court has held that the defense of lack of due process is not available to petitioner for the reason that it failed to come forward with evidence of impossibility or unavailability of proof.

There were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, namely:

Petitioner proceeded on the theory that there was no rational connection between the proven fact of receipt of price differentials and the presumption (1) that such differentials were unlawful, and (2) that petitioner knew this fact. It relied on cases holding that statutes (like the Robinson-Patman Act) creating presumptions of fact and making one fact *prima facie* evidence of another, violate [fol. 598] due process where there is no rational connection between the fact proved and the ultimate fact presumed; none of these cases required a showing by the defendant that proof was impossible or not available. See cases cited in Petitioner's Brief at pp. 41-45, viz., *Tot v. United States*, 319 U. S. 463; *Morrison v. California*, 291 U. S. 82; *State v. Kelly*, 218 Minn. 247, 15 N. W. 2d 554; *Great Atlantic & Pac. Tea Co. v. Errin*, 23 F. Supp. 70, 82; *Western & A. R. Co. v. Henderson*, 279 U. S. 639, 641-643; *Manly v. Georgia*, 279 U. S. 1, 5-6; *Bailey v. Alabama*, 219 U. S. 219, 238-239; *Luria v. United States*, 231 U. S. 9, 25-26.

Petitioner also relied on cases holding that such a presumption cannot operate against one who has neither possession nor control of the facts presumed. See cases cited in Petitioner's Brief at pp. 46-47, viz., *Westland Oil Company v. Firestone Tire and Rubber Company*, 143 F. 2d 326, and *Heiner v. Donnan*, 285 F. S. 312, 329.

This notion does not constitute an admission that the present record fails to show an unconstitutional burden.

Respectfully submitted, Edward F. Howrey, L. A. Gravelle, Harold F. Baker, Shoreham Building, Washington 5, D. C.; J. Arthur Friedland, Emil N. Levin, Elmer M. Leesman, 763 First National Bank Building, Chicago, Illinois, Attorneys for Petitioner.

February 7th, 1952.

Endorsed: Filed February 8, 1952. Kenneth J. Carrick,  
Clerk

[fol. 599] IN UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT, OCTOBER TERM, 1951, JANUARY SESSION,  
1952:

No. 10239.

AUTOMATIC CAÑTEEN COMPANY OF AMERICA, Petitioner,

VS.

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of an Order to Cease and Desist

Entered by the Federal Trade Commission

ON PETITION FOR REHEARING AND MOTION FOR LEAVE TO  
ADDUCE ADDITIONAL EVIDENCE—Filed March 3, 1952

Before Kerner, Duffy, and Lindley, Circuit Judges

KERNER, Circuit Judge:

After the entry of our decision affirming the order of the Federal Trade Commission and granting its cross petition to enforce, petitioner filed petition for rehearing and a motion for leave to adduce additional evidence under § 11 of the Clayton Act, 15 U. S. C. A. § 21.

Section 11 authorizes the court to order such additional evidence to be taken before the Commission if the movant "shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission."

The evidence petitioner now seeks to add to the record is intended to show that if the Robinson-Patman Act requires a buyer to prove its seller's cost justification, the statute imposes so heavy a burden on it as to amount to a deprivation of due process because such proof is not available or is impossible.

As grounds for its motion petitioner asserts that (1) the evidence is material in that this court held that the defense of lack of due process was not available to petitioner because it failed to come forward with evidence pertaining thereto; and (2) that there were reasonable grounds for failure to adduce it because it proceeded on the theory that

there was no rational connection between the proven fact of receipt of price differentials and the presumption that (a) such differentials were unlawful and (b) petitioner knew this fact.

We find no merit in petitioner's motion. It tried its case before the Commission on the theory that the Commission had the burden of proving absence of cost justification, and it contended that the Commission failed to sustain that burden, hence that it failed to prove its case, and for that reason petitioner simply refrained from introducing any evidence in defense. What it is now asking for is, in effect, to have the entire proceeding reopened in order to enable it to have a new hearing on a new theory of defense after it has had an adverse decision as to the theory originally relied upon in full and fair hearing before the Commission, and review of all issues raised on the record as made in that hearing. We think § 41 was not intended for any such purpose. This was not the "mere omission of some step, which has escaped the attention of both parties" referred to in *Kelly v. U. S.*, 300 U. S. 50, 54, cited by petitioner. There is considerable difference between the failure to authenticate a record, the situation in that case, and the failure to offer any evidence, relying upon a theory of defense subsequently held to be without merit. We find no such "reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission" as would justify the granting of the motion.

With respect to the petition for rehearing, we find that it presents no questions which were not fully considered by us in our original review of the petition and cross petition.

Petition for rehearing and motion to adduce additional evidence denied.

## [fol. 601] IN UNITED STATES COURT OF APPEALS

[Title omitted]

## ORDER DENYING PETITION FOR REHEARING AND MOTION TO ADDUCE ADDITIONAL EVIDENCE—March 3, 1952

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

It is further ordered by the Court that the motion of Petitioner for leave to adduce additional evidence be, and the same is hereby, Denied.

## [fol. 602] IN UNITED STATES COURT OF APPEALS

No. 10239.

AUTOMATIC CANTEEN COMPANY OF AMERICA, a Corporation,  
Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

FINAL DECREE AFFIRMING AND ENFORCING THE FEDERAL  
TRADE COMMISSION'S ORDER TO CEASE AND DESIST—March  
10, 1952

The petitioner herein, Automatic Canteen Company of America, a corporation, having filed with this Court on the 12th day of August, 1950, its petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, on the 6th day of June, 1950, under the provisions of the Clayton Act, as amended, in a proceeding before said respondent entitled "In the Matter of Automatic Canteen Company of America, a corporation, Docket No. 4933"; and a copy of said petition having been served upon the respondent herein; and the respondent having thereafter, to wit: on the 25th day of October, 1950, certified and filed herein, as required by law, a transcript of the entire record in said proceeding lately pending before it in which said order to cease and desist was entered; and the Federal Trade Commission,

respondent herein, having filed with this Court on the 14<sup>th</sup> day of February, 1951 its cross-petition for affirmance and enforcement of its order to cease and desist aforesaid, and a copy of said cross-petition having been served upon the petitioner; and the matter having been heard by this Court on briefs and oral argument of counsel; and this Court having thereafter fully considered the matter and having [fol. 603] rendered its decision on the 18th day of January, 1952 affirming and granting enforcement of the said order to cease and desist;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that the said order to cease and desist issued by the Federal Trade Commission, respondent herein on the 6<sup>th</sup> day of June, 1950, as aforesaid, be, and the same is, hereby affirmed and petitioner is commanded to obey the same;

And It Is Further Ordered, Adjudged and Decreed that the Automatic Canteen Company of America, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the leasing, licensing, operation, or sale of any automatic vending machine or parts thereof, or in connection with the offering for sale, sale, or distribution of candy, gum, nuts, or any other confectionery product purchased for resale by or through the use of automatic vending machines, in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Entering into, enforcing, continuing in operation, or effect, or carrying out any contract, agreement, or understanding for the lease or sale of automatic vending machines or parts thereof, or for the sale of candy, gum, nuts, or other confectionery products for use or resale in such machines on the condition, agreement, or understanding that any lessee, licensee, operator, or purchaser thereof

1. Shall not acquire, manufacture, own, hold, locate, use, operate, lease, or otherwise deal with any automatic vending machine which is not licensed, leased, purchased, or otherwise acquired from petitioner or from some source authorized by it.

2. Shall not offer to sell, sell, or cause or permit to be sold any candy, gum, nuts, or other confectionery products purchased from petitioner other than by means of automatic vending machines leased or purchased from it.
3. Shall not buy for resale, deal with, use, or permit to be used, in automatic vending machines leased or purchased from petitioner, the confectionery products of any seller or supplier other than petitioner.
- [fol. 604] 4. Shall order and purchase exclusively from petitioner all confectionery products offered for resale by means of automatic vending machines leased or purchased from petitioner.

Provided, however, that nothing contained in the preceding paragraphs numbered 1 through 4 shall be construed as prohibiting petitioner from entering into any contract, agreement, or understanding with any lessee, licensee, purchaser, or distributor of its automatic vending machines which provides for payment to the petitioner of such compensation as it may desire for the use of its automatic vending machines, for services rendered, for protection of quality and salability of products sold through its said vending machines, or provides for protection of petitioner's franchise territories and distribution, of its good will and trade name, or its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public, when none of such provisions are in conflict with the prohibitions set forth herein.

And It Is Further Ordered, Adjudged and Decreed that Automatic Canteen Company of America, a corporation, its officers, representatives, agents, and employees, in connection with the offering to purchase or purchase of any candy, gum, nuts, or other confectionery products of any nature in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Knowingly inducing or knowingly receiving or accepting any discrimination in the price of such products, by directly or indirectly inducing, receiving, or accepting a net price from any seller known by petitioner or its representatives to be below the net price

at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for petitioner's business, or where petitioner is competing with other customers of the seller; provided, however, that the foregoing shall not be construed to preclude the petitioner from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are by such seller sold [fol. 605] or delivered to petitioner.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are affected.

And It Is Hereby Further Ordered, Adjudged and Decreed that within ninety-(90) days after the entry of this decree the petitioner, Automatic Canteen Company of America, shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this decree.

Without prejudice to the right of the Federal Trade Commission, the respondent herein, to institute and maintain contempt proceedings for violation of this decree or other proceedings for that purpose as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court, /s/ Otto Kerner, Walter C. Lindley,  
United States Circuit Judges.

A True Copy

Teste:

Kenneth J. Carrick, Clerk of the United States Court  
of Appeals for the Seventh Circuit.

## [fol. 606] IN UNITED STATES COURT OF APPEALS

[Title omitted]

## ORDER STAYING ISSUANCE OF FINAL DECREE—April 9, 1952

On motion of counsel for the Petitioner, it is ordered that the issuance of the certified copies of the Final Decree to the Federal Trade Commission in this cause be, and the same is hereby, further stayed for a period of 90 days from the entry of the judgment in the above entitled cause.

## [fol. 607] IN UNITED STATES COURT OF APPEAL

[Title omitted]

DESIGNATION FOR SUPREME COURT RECORD—Filed April 22,  
1952

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Comes now the Petitioner in the above entitled cause and hereby designates for printing and for inclusion in the record before the Supreme Court of the United States the following documents:

1. Printed record of proceedings filed in the United States Court of Appeals for the Seventh Circuit on June 8, 1951.
2. Opinion of the United States Court of Appeals for the Seventh Circuit dated January 18, 1952.
3. Petition for rehearing filed by Petitioner on January 30, 1952.
4. Motion of Petitioner for leave to adduce additional evidence filed February 8, 1952.
5. Opinion of the United States Court of Appeals for the Seventh Circuit dated March 3, 1952, denying petition for rehearing and motion for leave to adduce additional evidence.
6. Final judgment or decree entered on March 10, 1952.
7. Order dated April 9, 1952, staying the issuance of the

final decree for a period of ninety days from the entry of the judgment.

[fol. 608] 8. The Clerk is requested to certify the complete record and exhibits filed in this Court to the Supreme Court of the United States for use in the matter of the Petition for Certiorari that will be filed in that Court in view of the stipulation made in this Court of Appeals appearing at page 568 of the printed transcript of record herein.

9. This designation for Supreme Court record dated

April 21, 1952.

Edward F. Howrey, L. A. Gravelle, Harold F. Baker,  
Shoreham Building, Washington 5, D. C.; J. Arthur  
Friedlund, Emil N. Levin, Elmer M. Leesman, 763  
First National Bank Bldg., Chicago, Illinois, At-  
torneys for Petitioner.

Endorsed: Filed April 22, 1952. Kenneth J. Carrick,  
Clerk.

[fols. 609-610] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 611] SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 89

STIPULATION—Filed October 21, 1952.

Subject to this Court's approval, it is hereby stipulated and agreed, by and between Counsel for the respective parties hereto, that for the purpose of hearing and deciding this case on the merits the printed record shall consist of the printed record on the petition for Writ of Certiorari excluding therefrom the following exhibits:

1. Commission's exhibits 5A to 5U inclusive, pages 327-355 inclusive.
2. Commission's exhibits 93-Z-23, -24, pages 356-357.
3. Commission's exhibit 93-Z-64A, page 360.

4. Commission's exhibits 93-Z-138 to 93-Z-140, inclusive, pages 360-363.
5. Commission's exhibit 96, page 382.
- [fols. 612-614] 6. Commission's exhibit 98A, page 383.
7. Commission's exhibit 180Q, page 386.
8. Commission's exhibit C-185-F, pages 388-389.
9. Commission's exhibits 250-A to 250-C inclusive, pages 390-391.
10. Report of compliance, pages 522-557 (middle of page).

It is further stipulated and agreed that either of the parties may refer in briefs and argument to the original transcript of record on file in this Court, including any part thereof which has not been printed.

*Edward F. Howrey,  
Shoreham Building,  
Washington 5, D. C.,  
Attorney for Petitioner.*

*ROBERT L. STERN,  
Acting Solicitor General,  
Attorney for Respondent,  
Federal Trade Commission.*

[Vol. 615] SUPREME COURT OF THE UNITED STATES

No. 89, October Term, 1952

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [REDACTED] 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,

Petitioner.

68.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.

EDWARD F. HOWREY,

E. A. GRAVELLE,

HAROLD F. BAKER,

*Shoreham Building,*

*Washington 5, D. C.*

J. ARTHUR FRIEDLUND,

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*763 First National Bank Building,*

*Chicago, Illinois;*

Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1951

No.

AUTOMATIC CANTEEN COMPANY OF AMERICA,  
*Petitioner,*  
*vs.*

FEDERAL TRADE COMMISSION,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.**

Petitioner Automatic Canteen Company of America prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 10, 1952.

**OPINIONS BELOW**

Although section 2(f), the "buyer liability" provision of the Clayton Act (as amended by the Robinson-Patman Act), was enacted over fifteen years ago, the opinion below is the first judicial examination of its meaning and interpretation. Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U. S. C. sec. 13(f). The proper interpretation of these few words when read together with other portions of the act is of great importance to the business life of this country and if wrongly

construed, so as to destroy the normal bargaining process, will have a major inflationary impact on our economy.

The *seller* who grants price differentials is required under the act to justify them by showing corresponding cost savings. This has long been recognized, but no one believed that *buyers* were required to make a similar showing. The court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where customers can no longer bargain over prices nor seek or receive lower prices unless they first produce cost justifications from the sellers' books and records.

The opinion of the court of appeals (R. 577) is reported at 194 F. 2d 433. A supplemental opinion denying petition for rehearing and motion for leave to adduce additional evidence was filed on March 3, 1952 (R. 599).

## **JURISDICTION**

The final decree of the court of appeals was entered on March 10, 1952 (R. 602). The jurisdiction of this Court is invoked under Title 28 of the U. S. Code, section 1254(1).

## **QUESTIONS PRESENTED**

1. Whether, in a proceeding against a buyer under section 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act apply to the buyer, as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

2. If so, whether such a construction constitutes a denial of due process in violation of the Fifth Amendment to the Constitution of the United States.<sup>1</sup>

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<sup>1</sup> In the event certiorari is granted additional questions, some of which are briefly discussed herein, will be presented: (1) Whether the court erred in denying petitioner's motion to adduce additional evidence to show

## STATUTES INVOLVED

The pertinent provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (Act of June 19, 1936, 46 Stat. 1526, 15 U. S. C. 13), are as follows:

See. 2(a). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

See. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima facie* case

---

that it was impossible for it to prove the seller's cost justification; (2) whether the court erred in holding that the present record fails to disclose such "impossibility of proof"; (3) whether the court erred in granting the cross-petition of the Federal Trade Commission for enforcement, a question on which there is a direct conflict between the Court of Appeals in this case and the Court of Appeals in the Second Circuit in *Rubicon Co. v. Federal Trade Commission*, 191 F. 2d 294 and (4) whether this Court should remand the case for failure of the Commission to consider workable alternative methods of administering section 2(f) of the Robinson-Patman Act.

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . .

See, 2(f). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

### **STATEMENT OF THE CASE**

This petition seeks review of that portion of the judgment of the Court of Appeals for the Seventh Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating section 2(f) of the Robinson-Patman Act.

Petitioner is engaged in the business of purchasing candy, gum and nuts from the producers thereof and in the resale of these products to its franchise distributors. These Canteen distributors in turn resell the same merchandise to the public by means of vending machines leased from petitioner and located for the most part, in factories and industrial establishments (R. 492-93).

The evidence before the Commission showed that petitioner brought to the attention of its suppliers certain economies created by its methods of doing business and asked them to pass such savings on to petitioner by way of a lower price (R. 369, 403-4). All of the suppliers who were queried on the subject testified there were savings in expense in serving Automatic Canteen Company naming such categories of savings as packaging, freight, selling expense, no free goods, no credit loss, no returns, etc. (R. .

49-50, 52, 60-61, 63-64, 76, 79-80, 82, 90, 95, 103, 137, 140-41, 151-53, 156, 185-86, 190, 193, 199-200, 203-04, 210-11, 222, 225, 237-39, 245-48, 254-55, 263, 275, 277, 285, 287).

On these facts the Commission took the view that a *prima facie* case was made and thereupon found that petitioner knowingly induced and received discriminations in price in violation of 2(f) (R. 511). The Commission said that the mere receipt or inducement of lower prices established a *prima facie* case against the buyer, that the burden of justifying such differentials on the basis of the *sellers'* differences in cost then shifted to the buyer, i.e., that the provisions of 2(a) and 2(b) relating to *prima facie* proof apply to the buyer as well as to the seller (R. 519-20).

Petitioner contended that the *prima facie* provisions of the act apply to sellers only; that they were not meant to apply, and produced an absurd result if applied, in a case against the buyer under 2(f). It contended that if such provisions do apply they amount to a legislative presumption constituting a denial of due process, in that, there is no rational connection between the fact proved, i.e., price differences, and the ultimate facts presumed, viz., differences which actually exceeded the sellers' cost differences and knowledge of such excess on the part of the buyer. Petitioner also contended that the Commission's construction of the statute precluded petitioner from the right to make its defense because it was impossible for a buyer to go forward with cost justification evidence hidden within the reaches of the accounting books and records of 75 to 100 third-party suppliers of candy bars, nuts and chewing gum.

The court of appeals affirmed the order of the Commission saying that when subsections (a), (b) and (f) of section 2 of the act are read together there is "no basis in the

language of the three subsections for a distinction in their scope as between buyers and sellers" and that the act "places precisely the same burden of proving cost justification upon the buyer" as it does upon the seller (R. 577-78).

With respect to due process the opinion of the court of appeals (1) ignored petitioner's argument regarding legislative presumptions, and (2) held it was foreclosed from asserting it was impossible for a buyer to produce the sellers' cost justifications because petitioner had failed to lay a proper evidentiary foundation for such assertion (R. 578-79).

After the decision below affirming the order of the Commission, petitioner filed a petition for rehearing (R. 581) and a motion for leave to adduce additional evidence under section 11 of the Clayton Act. 15 U.S.C. sec. 21 (R. 597). The Court of Appeals denied petitioner's petition and motion on March 3, 1952 (R. 599).

### **REASONS FOR GRANTING THE WRIT**

**1. From the standpoint of impact on our competitive system and the number of persons and firms affected, this case presents one of the most important trade regulation cases ever to come before this Court.**

This is a case of first impression. It presents a question of statutory construction and a Constitutional issue of due process under the Fifth Amendment of paramount importance in the administration and enforcement of the Robinson-Patman Act. The issue is whether the Federal Trade Commission and the court of appeals were correct in interpreting section 2(f) of the act as placing upon the buyer the burden of proving the sellers' cost justifications for lower prices received by the buyer.

Such an interpretation cuts deeply into the traditional bargaining process between a seller and buyer in every

industry and in very interstate transaction. The Commission's order, affirmed by the court of appeals, confronts every buyer in interstate commerce with the peril that if, for goods of like grade and quality, he accepts a lower price, he must be prepared to prove that the seller's differential price was cost justified.

The serious public importance of this statutory interpretation is shown by the following considerations:

**A. IT HAS A DIRECT IMPACT UPON THE HUNDREDS OF THOUSANDS OF BUYERS OF THIS COUNTRY AND EVERY PURCHASING AGENT IN THE UNITED STATES<sup>2</sup>**

This petition, in a realistic sense, is a request for a final determination of the grave issue presented herein for the benefit of the whole class of purchasers described above. Apart from what the petitioner has at stake, this case has the widest commercial consequences upon the historic purchasing procedures of the American economy. It is analogous to a "class action" of such comprehensive scope as in itself to reveal a basis for the urgent need of a review by this Court.

The basic issue is whether the American buyer—be he a retailer, wholesaler, or manufacturer—is to be deprived of the time-honored opportunity to bargain over prices.

Under the Commission's order subsection (f) would attach to every buyer in interstate commerce,

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<sup>2</sup> According to the 1948 Census of Business there were in the United States 1,769,540 retail stores reporting \$130.5 billion in total sales and receipts; personnel totalled more than 9.7 million persons, of whom 7.1 millions were paid employees, 1.7 millions were actively engaged proprietors of unincorporated businesses, and 930,000 were unpaid family members working in retail stores.

Wholesale trade sales for the same year totalled \$190.5 billion for 243,366 separate establishments; this segment of our economy provided employment for 2,666,923 persons.

The 1947 Census of Manufacturers shows 240,881 manufacturing establishments with a "value added by manufacture" of \$74,425,825,000.

where the seller is competing with any other seller for respondent's [the buyer's] business or where respondent, [the buyer] is competing with other customers of the seller (R. 513).

As stated by the Amicus below, "Seldom has an appeal from a Federal Trade Commission order involved more universal and important business consequences that transcend the interest of any individual respondent in a particular Commission proceeding. . . . It would be difficult to examine any aspect of daily business or trade without finding that the rule the court is here considering would have an immediate and comprehensive impact".<sup>3</sup>

The job of buying is vitally important to the success of any enterprise whether it be a manufacturing establishment, a distributor, a department store, or a corner grocery. Everything manufactured reflects in some measure the fabrication of purchased raw materials and the assembly of purchased components. In the automobile industry, for example, some 78 other industries contribute to automobile manufacture (see Table A).

The Ford Motor Company's total purchases each year are equivalent to a purchase order for \$800,000,000 issued to American industry.<sup>4</sup> The assembly of the finished automobile depends on bringing together more than 10,000 parts, procured from more than 7,000 different sources of supply, in the proper quantities and balance, exactly when and where they are needed. It is the responsibility of the purchasing organization to ~~schedule~~ and coordinate this tremendous procurement program.<sup>5</sup>

The industrial purchasing function has been described by one authority as follows:

<sup>3</sup> Brief of Atlas Supply Co., Amicus Curiae, pp. 1-3.

<sup>4</sup> Purchasing, July, 1948, p. 133.

<sup>5</sup> Ibid, p. 131.

## TABLE A

## Industries Contributing to Automobile Manufacture

| Raw Materials:   | Partially Completed Components: |
|------------------|---------------------------------|
| Steel            | Frames                          |
| Textiles         | Upholstery                      |
| Lumber           | Seat Parts                      |
| Glass            | Windshields                     |
| Paint            | Windows                         |
| Oil and Grease   | Lenses                          |
| Plastics         | Wiring                          |
| Body Insulation  | Flexible Conduit                |
| Bonding Material |                                 |
| Anti-Freeze      |                                 |
| Gasoline         |                                 |

## Completed Components:

| Electrical Goods: | Mechanical:          | Miscellaneous:  |
|-------------------|----------------------|-----------------|
| Lights            | Carburetors          | Tires           |
| Instruments       | Clutches             | Tubes           |
| Batteries         | Bumpers              | Carpeting       |
| Switches          | Transmission Shaft   | Rubber Flooring |
| Motors            | Axles                | Brake Lining    |
| Generators        | Mufflers             | Metal Trim      |
| Spark Plugs       | Air and Gas Cleaners | Mirrors         |
| Relays            | Springs              | Hub Caps        |
| Cables            | Radiators            | Ornaments       |
| Radios            | Fan Belts            | Nuts and Bolts  |
| Distributors      | Engine Mountings     | Screws          |
| Condensers        | Gaskets              | Washers         |
| Fuses             | Wheels               | Cotter Pins     |
| Resistors         | Brakes               | Nails and Tacks |
| Horns             | Steering Wheels      | Hose            |
| Clocks            | Locks and Keys       | Pedal Pads      |
|                   | Universal Joints     |                 |
|                   | Bodies               |                 |
|                   | Bearings             |                 |
|                   | Pumps                |                 |
|                   | Windshield Wipers    |                 |
|                   | Heaters              |                 |
|                   | Shock Absorbers      |                 |
|                   | Transmissions        |                 |
|                   | Chains and Sprockets |                 |
|                   | Keys and Splines     |                 |
|                   | Hydraulic Systems    |                 |

Purchasing has emerged as a vital and constructive force in management, an essential factor in setting and carrying out company policies, the determining factor in production quotas and accomplishments, the most potent means of achieving economically sound product cost and maintaining a favorable competitive and profit position, a constructive element in public relations, and with economic implications that reach and affect every sector of the national industrial community.<sup>6</sup>

A metropolitan department store in New York, Chicago or Los Angeles buys thousands of separate consumer items for resale, ranging from such durable goods as refrigerators to such fragile objet d'art as fine porcelains and delicate blown glass.

The small business man,—the wholesaler, the retailer, the grocer, the variety store—is in the aggregate the greatest purchaser of all both in number and dollar volume. For hundreds of years he has sought to persuade sellers to reduce prices. This effort to buy cheaply has always been considered beneficial to our economy. It is in fact an essential feature of price competition.

#### B. THE ECONOMIC EFFECT OF THE DECISION BELOW

The interpretation upon which the Commission's order is based distorts the ancient principle of the Anglo-American common law and our own statutory system that the bargaining process inherently involves a buyer who seeks to buy as cheaply as possible. Section 2(f) of the Robinson-Patman Act limits this freedom of haggling over the price only to the extent of preventing unlawful discrimination resulting from the knowing receipt by a buyer of differential prices which reflect more than cost savings.

<sup>6</sup> Stuart F. Heinrich, Editor of Purchasing, referring to the purchasing policies of Albert J. Browning, Vice-President in charge of Purchasing, Ford Motor Company, July, 1948, p. 97.

On that proposition there is no dispute in this case. What is in controversy is an interpretation of section 2(f) which imputes to the Congress an intention to create for the buyer the hazard that he is inducing and receiving a lower price which he cannot cost justify because the data essential to such justification is in the exclusive possession of the seller who grants the price differential. If the buyer must proceed at his own peril unless he can prove that the seller's lower price is justified by differences in cost, then buyers generally cannot safely continue to bargain in the manner heretofore regarded as the essence of the bargaining process upon which a competitive system depends. The inevitable result for buyers in general would be to seek the legal shelter of a one-price purchase and sale basis as an escape from the legal fiction that the buyer is in as favorable a situation to prove the seller's cost justification as the seller himself.

This reversal of the traditional process of bargaining in commercial transactions presents a substantive and procedural due process issue under the Fifth Amendment. If the Commission and court of appeals are right in imputing to Congress an intention to place upon competition the clog that would necessarily result from requiring a buyer to prove the seller's cost justification, then this Court should decide whether or not such Congressional intention is consistent with due process or denies due process because of the drastic effects it would have in precluding buyers generally from the very hard bargaining which the hard competition of the private enterprise system demands.

2. The decision by the court below that the Robinson-Patman Act requires a buyer to prove his seller's cost justification presents a question as to the proper construction of section 2(f) which is of major importance in the administration of the act and which has not been but should be settled by this Court.

The court below erroneously held that section 2(f) places precisely the same burden upon the buyer, as it places on the seller, to prove cost justification once the Commission establishes knowing inducement or receipt of a price difference. Accordingly, this case presents the major legal question of whether in a proceeding against a buyer under 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act apply to the buyer as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

#### A. THE QUESTION IS OF MAJOR IMPORTANCE TO THE ADMINISTRATION OF THE ACT.

It seems obvious that the "buyer liability" subsection cannot be administered with any degree of certainty until the Supreme Court has finally ruled upon the interpretation of its provisions. If the Commission had lost below it could have advanced this reason for review with compelling conviction. It is no less valid when asserted by petitioner on behalf of all buyers who are necessarily affected by the decision of the court below.

A similar situation was recently presented to this Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231. As in the present case, the Commission issued a cease-and-desist order against respondent and the order of the Commission was upheld by the court of appeals.

This Court, however, "granted certiorari on petition of the company because the case presents an important issue under the Robinson-Patman Act which has not been settled by this Court."

In the present case, the court below held in effect, citing the *Merton Salt* case (334 U. S. 37), that since the statute places the burden of proof as to cost justification on the seller, it necessarily follows that "precisely the same burden" rests on the buyer (R. 577-78). Such a mechanistic rationale is patently unsound; it applies a principle of law, reasoned and sound under one set of circumstances, to an entirely different set of circumstances without analysis as to the application of the rule in the latter situation. The result is unfair and oppressive, not only to the parties involved, but to all buyers and all future litigants under 2(f).

With buyers and sellers placed in the same procedural situation, it is only reasonable to assume that in the future, in order to avoid difficult and lengthy litigations arising in seller cases where cost justifications can be made, the Commission may resort to the easier method of proceeding primarily against buyers. As successive buyers are subjected to cease and desist orders like the one in this case, and as still others attempt to bring their policies into line with such orders, price competition on the basis of increased efficiency in distribution will disappear.

In its place will be a rigid price structure foreign to the philosophy of our competitive system and also contrary to the real philosophy of the Robinson-Patman Act which was designed to preserve lower prices based on more efficient means of manufacture and distribution.

This result is reached because the Commission's decision forecloses the petitioner from receiving admitted cost savings. The evidence in this case established one fact

beyond all doubt—sellers realized *some* savings in cost in selling to petitioner. However, as a practical matter, the order forbids any differential based on such cost savings inasmuch as it is physically and economically impossible for petitioner, the buyer, to present evidence as to the seller's cost differences. The result is that petitioner can not safely accept a lower price on any transaction if that price is known by petitioner to be lower than the price to another even though it is clear that sellers enjoy lower costs of manufacture, service, and delivery with respect to petitioner's purchases. This means that petitioner and the thousands of buyers affected by this decision must buy only at the highest price of any seller.

Thus, although the Robinson-Patman Act was designed to promote competition, not to shackle it, the result of the commission's order and the opinion of the court below will be to weaken competition by making it impossible for buyers to accept price differences that are entirely legitimate because of undeniable cost savings.

#### B. THE CONSTRUCTION OF SECTION 2(f) APPROVED BY THE COURT BELOW REQUIRING A BUYER TO PROVE HIS SELLER'S COST JUSTIFICATION IS CLEARLY ERRONEOUS.

1). *Sections 2(a) and 2(f) prohibit placing on the buyer the burden of proving a seller's cost justification.*

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price which is prohibited by this section" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2 which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "discrimination in price which is prohibited by this section" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b) which provides that the burden of showing justification shall shift to the alleged violator upon proof of a *prima facie* case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer*, *not a seller*. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale, or delivery; for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

To interpret 2(f) otherwise would require a complete rewriting of the section to incorporate within it provisos operating as affirmative defenses. The provisos of section 2(a) specifically apply to sellers only. Any attempt to incorporate in 2(f) by judicial interpretation the provisos of 2(a) is not only contrary to the express language of section 2(f) but produces the absurd result of placing on the buyer the impossible task of proving the seller's cost justification. The mere fact that section 2(a) places the burden of proof on the seller with respect to certain exemptions does not *ipso facto* place upon the buyer in a 2(f) proceeding a similar burden. Had Congress meant to do so, it could easily have added exemptions or provisos to 2(f) specifically applicable to the buyer.

## 2). Application of 2(b) is limited to sellers.

A major prop in the reasoning of the Commission and the court below is section 2(b) of the act which provides that the burden of showing cost justification shall shift to

"the person charged" with a violation of the section. We agree that section 2(b) is important. Indeed, since the procedural provisions of 2(b) deal specifically with the question of burden of proof and were, as the Commission states, inserted for the sole purpose of establishing rules as to "burden of proof", that section is controlling. Analysis of 2(b) shows unmistakably that it applies only to seller, and that the court below was in error in holding that it applies also to the buyer.

Such procedural devices as that set forth in 2(b) for shifting the burden of proof originate in and draw their reasoned strength from elementary common law principles. In upholding these provisions as applied to the seller, the courts have pointed out that he is the one who "sets two prices", "knows why he has done so", and "possesses all the data as to costs".<sup>7</sup>

The Congressional sponsors intended section 2(b) to apply to the seller alone. They said:

Where the information is peculiarly within the knowledge of the party the burden shifts to him.<sup>8</sup>

Where for any reason, the evidence to prove a fact is chiefly, if not entirely within the control of the party . . . then the burden of going forward rests on him.<sup>9</sup>

The legislative history makes it clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission. Thus, Congressman Patman declared that "the matter of burden of proof" is "a restatement of existing law". 80 Cong. Rec. p. 8442. See also Utterbaek, 80 Cong. Rec. p. 9418; Gilchrist, 80 Cong. Rec. p. 8452; Ekwall, 80 Cong. Rec. p. 8328. The "law of this land" which Congressman Patman said

<sup>7</sup> *Moss, Inc. v. F.T.C.* (C.A.2), 148 F. 2d 378, 379; *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 60.

<sup>8</sup> 80 Cong. Rec. p. 8328.

<sup>9</sup> 80 Cong. Rec. p. 8452.

section 2(b) was intended to write into the act has never placed such an unfair and oppressive burden of proof on a defendant as the burden which the court below foists upon petitioner in ruling that the buyer must undertake the burden of proving the cost justifications of his various sellers.

Obviously, the buyer has no knowledge of the facts concerning the seller's cost justification in his possession nor does he have them within his control. Inherently, buyers and sellers are at opposite poles—they bargain at arm's length: If anyone knows whether or not a price granted is unlawful, it is the seller.

The court below ignored this clear Congressional intent to apply section 2(b) to the seller alone. The court apparently took the position that the words of the statute are plain and require no recourse to the legislative history for clarification. The fallacy of this approach where the Robinson-Patman Act is concerned is readily apparent.<sup>10</sup> This Court has found it appropriate to resort to the legislative history in deciding the various Robinson-Patman Act cases which have come before it. See, e. g., *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, at footnote 14. Legislative history was extensively relied upon by the Court in the recent case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384.

In the present case, the Court is dealing with a statute which is "inescapably ambiguous" (in the words of Mr. Justice Jackson, concurring with Mr. Justice Minton in the *Schwegmann* case) and the legislative history makes it plain that Congress intended only to restate the existing

<sup>10</sup> See, e.g., *Rubberoid Co. v. Federal Trade Commission* (CA, 2) 189 F. 2d 893, 894; "We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." See also Lindley, J. in *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 677 (E. D. Ill., 1946); "I doubt if any judge would

law of the land as to burden of proof and not to enact such an unusual, and unprecedented, procedural requirement as the one that a buyer who accepts a lower price from a seller does so in peril of being required at a later date to justify the seller's cost data—data which is necessarily in the possession of the seller, not the buyer.

In the *Morton Salt Company* case (334 U.S. 37, 44-45) this Court said that the burden of proof was on the seller because the cost justification proviso of 2(a) was a special exception and because 2(b) "specifically imposes the burden of showing justification on one who is shown to have discriminated in prices". Only a seller can discriminate in price. Mr. Justice Jackson, although dissenting, concurred in the Court's holding regarding the seller's burden of proof. "I agree," he said, "that these facts warrant a *prima facie* inference of discrimination unless the company [the seller] which best knows why and how these discounts are arrived at and which possesses all the data as to cost, comes forward with the justification." 334 U.S. 37, 60.

We submit that the fundamental rules of fair procedure which place on the party who knows the facts the burden of going forward with the evidence, as developed by the courts and restated by Congress in 2(b), govern this case and require this Court to reject the construction of 2(f) by the court below.

3). *The court below rewrote section 2(f) in a manner at variance with the Congressional intent.*

The court below, in order to reach the result it did, was required to rewrite 2(f) in several particulars. It eliminated the phrase "prohibited by this section"; it read into 2(f) the cost justification proviso of 2(a) and the prima

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assert that he knows exactly what does or does not amount to violation of the Robinson-Patman Act in any and all instances." Cf. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786 (C.A. 7, 1951).

facie provisions of 2(b); and it interpreted the word "knowingly" to mean merely that the buyer knew he was getting a lower price.

This makes a vastly different statute from the one Congress wrote. A mere price differential was not "prohibited" by Congress,<sup>11</sup> nor was a lower price which can be cost justified.

In the same manner the court's interpretation of the word "knowingly" clearly violates the intention of Congress—in fact, it leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price; that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute". *St. Joseph Stockyards Co. v. U. S.*, 187 Fed. 104, 105.

The court below construed section 2(b) as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a prima facie case shall be "upon the person charged with violation" (R. 578). This construction disregards several factors.

In the first place, the "person" referred to must be one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities" furnished under 2(e), i.e., the seller. It necessarily follows, as stated by the Third Circuit in *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 106 F. 2d 667, 677, that the language of 2(b) "relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but [is] not applicable to pro-

<sup>11</sup> *Bruce's Juices v. Amer. Can Co.*, 330 U.S. 743, 745-46:

"The act does not prohibit all quantity discounts. . . . Congress refused to declare flatly that they are illegal."

ceedings instituted under paragraphs (c) or (d)". Such a conclusion is required since subsections (c) and (d), like subsection (f), cover prohibitions not mentioned in 2(b). No more than 2(b) applies to 2(c) and 2(d) does it apply to 2(f). In this respect, the decision of the court below, which held that 2(b) does apply to 2(f) is in conflict with the reasoning of the Third Circuit in *Great Atlantic & Pac. Tea Co. v. F.T.C.*, supra.

Secondly, the meeting competition proviso of 2(b) states "nothing herein contained shall prevent a seller rebutting the *prima facie case thus made* by showing, . . ." (emphasis supplied). Clearly, the phrase "*prima facie case thus made*" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "a seller", Congress intended that the first part of 2(b) as well as the second part should be applicable to sellers only. The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment".<sup>12</sup>

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination". The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legis-

<sup>12</sup> No better illustration of the rule of *expressio unius est alterius exclusio* could be found. See *Ford v. U. S.*, 273 U.S. 593, 611; 2 Sutherland (3d ed. Horack), *Statutory Construction* (1943), pp. 412-414.

lative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.<sup>13</sup> In fact section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.<sup>14</sup> The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.<sup>15</sup>

### **3. The construction adopted by the court below raises serious constitutional questions.**

A. IT DENIES DUE PROCESS BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE PROVEN FACT OF PRICE DIFFERENCES AND THE PRESUMPTION THAT SUCH DIFFERENTIALS WERE (A) UNLAWFUL, AND (B) THAT PETITIONER KNEW THIS FACT.

Statutes like the Robinson-Patman Act creating artificial presumptions of fact and making one fact *prima facie* evidence of another, are by no means new or even modern. Where they are reasonable and where there is a rational connection between the fact proved and the ultimate fact presumed, they have long been recognized and enforced by the courts.

On the other hand where they are unreasonable and arbitrary the courts have been quick to strike them down.<sup>16</sup>

The function of such statutes has been said to be "to make it possible to convict where proof of guilt is lacking". *Pollock v. Williams*, 322 U. S. 4. In fact, of recent years

<sup>13</sup> H.R. 8442; H. Rep. 2287, 74th Cong. 2d Sess.

<sup>14</sup> 80 Cong. Rec. p. 6428.

<sup>15</sup> H. Rep. No. 2951, 74th Cong. 2d Sess. p. 8.

<sup>16</sup> *Tot v. United States*, 319 U.S. 463; *State v. Kelly* (1944), 218 Minn. 247, 162 ALR 477, 15 N.W. (2d) 554; *Great Atlantic & Pac. Teq Co. v. Ervin*, 23 F. Supp. 70; *Morrison v. California*, 291 U.S. 82; *McFarland v. Amer. Sugar Ref. Co.*, 241 U.S. 79; *Western & A. R. Co. v. Henderson*, 279 U.S. 639; *Manley v. Georgia*, 279 U.S. 1; *Bailey v. Alabama*, 219 U.S. 219.

there has been such a marked increase in the creation of this statutory device as to suggest not only a design to minimize the labor of investigators and prosecutors but a trend—supported by some judicial dictum that there are no vested rights in rules of evidence—to consider the rights of individuals as secondary to the demands of society.<sup>17</sup>

Statutes of this nature are of two general types: those creating conclusive presumptions of law or fact; and those creating rebuttable presumptions or "prima facie" proof such as section 2(b) of the Robinson-Patman Act as applied to a seller. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.<sup>18</sup> Those of the second type have met a varying fate, some notwithstanding and others succumbing to attacks on diverse grounds. It would be redundant to undertake a complete review and analysis of the decisions passing upon the validity of such statutes in view of the many exhaustive opinions and commentaries which can be consulted for that purpose.<sup>19</sup>

The test of rational connection in testing *prima facie* proof was first enunciated by this Court in 1910 in the case of *Mobile, J. & K. C. R. Co. v. Turnipseed*; 219 U. S. 35. Since then it has been applied many times, with varying results, in criminal as well as civil cases. The latest pronouncement on the subject is *Tot v. United States*, 319 U. S. 463. This decision laid down the clearest and best enunciation of the test of rational connection we have had so far and there can be but slight doubt that it will be quoted as the model formulation of the rule in many later cases just

<sup>17</sup> See Brozman, The Statutory Presumption, 5 Tulane L. Rev. 178; Chamberlain, Presumptions as First Aid to the District Attorney, 14 ABA Jour. 287; O'Toole, Artificial Presumptions in the Criminal Law, 11 St. John's L. Rev. 167.

<sup>18</sup> See 20 Am. Jr., Evidence, sec. 10.

<sup>19</sup> These are collected in annotations at 162 ALR 495, 86 ALR 179 and 51 ALR 1139.

as the *Turnipseed* case has been quoted in countless cases during the last 35 years.

The Court in the *Tot* case had under consideration the validity of section 2(f) of the Federal Firearms Act, 15 U. S. C. sec. 902(f), which provided: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by any such person in violation of this Act".

The Government's evidence was limited to proof of Tot's prior conviction on an assault and battery charge, his plea to a burglary charge, and that in 1938 he was found in possession of a loaded automatic pistol.

The question up for decision was the power of Congress to create the presumption that "From the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute". 319 U. S. at 466.

In sustaining the contention that the statute failed to meet the tests of due process Mr. Justice Roberts, speaking for a unanimous court, said:

The rules of evidence are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of

facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . The government seeks to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed; if the inference of the one from proof of the other is arbitrary because of a lack of connection between the two in common experience.

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the sellers' cost differences and knowledge thereof on the part of the buyer.

#### B. TO PLACE THE BURDEN OF COST JUSTIFICATION UPON A BUYER CREATES A CONCLUSIVE PRESUMPTION OF FACT IN VIOLATION OF THE DUE PROCESS CLAUSE.

Presumptions cannot operate against one who has neither possession nor control of the facts presumed. *Westland Oil Co. v. Firestone Tire and Rubber Co.*, 143 F. 2d 326; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 P. 838, L. R. A. 1917E 178; *Clark v. Detroit & M. Ry. Co.*, 197 Mich. 489, 163 N. W. 964, L. R. A. 1917F 851.

While the test of comparative convenience of producing evidence was rejected as an independent test in the *Tot* case, it has been the subject of considerable discussion. 162 A. L. R. at p. 511. It has been applied only (a) where the defendant has more convenient access to the proof, and

(b) where requiring him to go forward with such proof will not subject him to unfairness or hardship.

In the *Turnipseed* case the Court, after stating that the validity of a legislative presumption depends on a rational connection between the fact proved and the ultimate fact presumed, said (219 U. S. 35):

So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude a party from the right to present his defense to the main fact presumed.

The foregoing quotation is directly in point. If the attempt made here to apply the *prima facie* provision of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings, and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 75 to 100 suppliers.

A statute compelling a party to produce proof not in his possession or control is surely subject to constitutional attack. However, the court below refused to pass on this important question, saying that petitioner had "laid no foundation for its assertion . . . that cost justification was impossible of proof by a buyer", citing *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352-53, and *Tennessee Consolidated Coal Co. v. Comm.*, 117 F. 2d 452. These cases are not in point. There the petitioner was in full possession of all the facts but refused to put them in evidence.

We think the court of appeals erred in holding that the record failed to disclose the "impossibility of proof". The Commission introduced records and summaries of records covering a ten year period showing the prices at which more than 75 manufacturers sold their candy, gum and nuts to petitioner (R. 515). To meet this, petitioner, the buyer, would be required to make cost justifications for 750 years

(10 years X 75 suppliers) from the books and records of companies not parties to the litigation and against whom petitioner has no power of compulsory subpoena or process. The Court should take judicial notice of the fact that such a feat is impossible; it is common knowledge, moreover, that cost accounting is far from an exact science, that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the seller's books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretation of records.<sup>29</sup>

"Detailed cost figures are among the most confidential of completely financial data, and the idea of submitting them to audit by the customer is contrary to all accepted rules of good business practice". Purchasing 361, Prentice Hall 1947.

C. SINCE THE COURT BELOW REFUSED, ON WHOLLY TECHNICAL AND PROCEDURAL GROUNDS, TO EXAMINE THE CONSTITUTIONAL QUESTION, A CASE OF WIDE APPLICATION WAS DECIDED WITHOUT CONSIDERATION OF IMPORTANT AND POSSIBLY DETERMINATIVE ISSUES.

Petitioner sought to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 597). On a narrow legal technicality that this offer of evidence had not been made in due time, the court below denied petitioner's motion (R. 599). It held that the present record failed to show such "impossibility" of proof, while simultaneously denying the petitioner the right to enlarge the record to deal with the question.

<sup>29</sup> The courts will take judicial notice of facts which are well and universally known without particular proof being adduced in regard to them, and also with reference to those dealings of the commercial world which are of like notoriety. *Schollenberger v. Pennsylvania*, 171 U.S. 1. See also *Minnesota v. Barber*, 136 U.S. 313, 321; *Phillips v. Detroit*, 111 U.S. 604, 606.

At the very least, even if the Commission's interpretation of the statute should be sustained by this Court, the substance of due process requires this Court to recognize that foreclosure of proof that it is impossible for a buyer to show a seller's cost justification makes historic business relationships between sellers and buyers in every industry depend for their legality upon a highly technical choice *in limine* by a defendant of a statutory construction which even the courts may find extremely difficult to decide in the search for the frequently elusive Congressional intent. Without admitting that the record failed to disclose the very impossibility of proof which petitioner put in issue before the Commission and in the reviewing court below, it is nevertheless clear that there was an unconscionable denial of due process by reason of the failure to remand the case to the Commission for a full determination of this question.

It is undeniable that the word "discrimination" cannot be a talismanic word of illegal conduct by a mechanical and literal interpretation. The Commission and the courts have recognized in every Robinson-Patman Act proceeding that the term "discrimination" is *not* synonymous with a price differential.

Inequality is the essence of discrimination. As Mr. Justice Frankfurter pointed out in a different factual situation, but nevertheless by way of a situation applicable to this case, "The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequal". *New York v. United States*, 331 U. S. 284, 352.

The bargaining process historically has recognized that unequals arise by reason of savings resulting from economy and efficiency imputable to the method or the quantity by which some purchasers buy as against less efficient and less economical methods by which other purchasers buy or take delivery. In this case, the Commission and the court

of appeals arbitrarily assumed that such differences must be cost justified by the buyer. In so ruling, both tribunals assumed that this is the one and only interpretation which conforms to the Congressional intent. The petitioner asks that this Court review this substantial federal question of widespread public importance to ascertain whether such an interpretation denies petitioner substantive due process in the absence of record evidence that the Commission weighed alternative interpretations consistent with the objectives of the legislation but without doing violence to long-established usages of a bargaining relationship concerning prices.

If the ruling of the court of appeals remains in effect, then the petitioner and all buyers similarly situated will be faced with a peril of being held in violation of the act *per se* whenever they knowingly accept prices lower than those of their competitors.

### **CONCLUSION**

This case may seem to present the bare procedural question as to whether the burden of justification shifts to the buyer after the Commission has shown "knowing" receipt of a lower price. Technically that is the legal question posed by the case, but its answer raises broad substantive problems with major commercial, social and consumer implications.

The whole history and pattern of purchasing—whether the purchaser be the housewife, the lawyer buying office furniture, the small merchant acquiring goods in the market place, the relatively small interstate concern such as petitioner, or the very large manufacturing or distributing concern—demonstrate that all seek a lower price. The commercial buyer often advances reasons why he should receive a more attractive price—that is his job, and his whole training and competitive experience. Surely our

trading system has not become so stagnant by virtue of the Robinson-Patman Act that the buyer must now say to the seller: "Are your prices too low?—Be sure now not to give me too good a price". That is precisely what the views of the Federal Trade Commission add up to in this case.

If the United States is to follow the road of certain other countries where the merchant is literally just a shopkeeper or a mere "stockist", with no virility in buying or selling, then Congress should say so in unmistakable statutory language. Certainly it turned no such sharp corner in its enactment of section 2(f) which was a Senate floor amendment adopted without debate or other serious legislative consideration.

For the above reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May, 1952.



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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,  
*Petitioner,*  
*vs.*

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1952

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No. 89

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AUTOMATIC CANTEEN COMPANY OF AMERICA,  
*Petitioner.*

vs.

FEDERAL TRADE COMMISSION

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

**BRIEF FOR PETITIONER**

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**Introduction**

This is a case of first impression. From the standpoint of impact on our competitive system and the number of persons and firms affected, it presents one of the most important trade regulation cases ever to come before this Court. The issue is whether the Federal Trade Commission

and the Court of Appeals for the Seventh Circuit were correct in interpreting section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act,<sup>1</sup> as placing upon the buyer of commodities the burden of proving the sellers' cost justifications for lower prices received by the buyer; and if so, whether such a construction denies due process.

Although section 2(f) was enacted over sixteen years ago, the opinion below is the first judicial examination and interpretation of its meaning.

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section". The proper interpretation of these few words when read together with other portions of the act is of great importance to the business life of this country and, if wrongly construed, so as to destroy the normal bargaining process between buyer and seller, will have a revolutionary impact on our economy.

The seller who grants price differentials is required under the act to justify them by showing corresponding differences in manufacturing or distribution expense. This has long been recognized, but it was not believed that the buyer was required to make a similar showing. The court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where purchasers can no longer seek or receive lower prices unless they first produce cost studies from the reaches of the sellers' books, records and differing functional methods of operation.

### **Opinions Below**

The opinion of the Court of Appeals (R. 506) is reported at 194 F. 2d 433. A supplemental opinion denying petition

for rehearing and motion for leave to adduce additional evidence (R. 534) is reported at 194 F. 2d 439.

### **Jurisdiction**

The final decree of the Court of Appeals was entered on March 10, 1952 (R. 538). The petition for a writ of certiorari was filed on May 29, 1952, and granted on October 13, 1952 (R. 544). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

### **Questions Presented<sup>2</sup>**

1. Whether, in a proceeding against a buyer under section 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act<sup>3</sup> apply to the buyer, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.
2. If so, whether such a construction constitutes a denial of due process in violation of the Fifth Amendment to the Constitution of the United States—
  - (a) because there is no rational connection between the proven fact of knowing receipt of price differences and the double presumption that such differentials are (1) unlawful, and (2) that petitioner knew this fact; or
  - (b) because such presumptions amount to conclusive presumptions, in that, petitioner is precluded from the right to present his defense to the main facts presumed, facts which are not in his possession or control but are hidden within the books, records and functional methods of 80 to 115 third party manufacturers.<sup>4</sup>

<sup>2</sup> The questions under this heading include Petitioner's specification of errors.

<sup>3</sup> Act of June 19, 1936, 49 Stat. 4526, 15 U.S.C. 13(a) and (b).

<sup>4</sup> The collateral question—Whether the Court of Appeals erred in holding that the present record fails to disclose that proof of the sellers' cost justifications "is not available, or is impossible"—is considered under this heading in "Part II".

3. Whether the Court of Appeals erred in granting the cross-petition of the Federal Trade Commission for enforcement of its order.<sup>5</sup>

If this Court should hold against petitioner on questions 1 and 2, additional questions are:

4. Whether the court below should have granted petitioner's motion for leave to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 534-535).

5. Whether this Court should remand the case for failure of the Federal Trade Commission to consider workable alternative methods of administering section 2(f) of the Robinson-Patman Act in harmony with its Congressional objectives and the general anti-trust public policy of the United States of maintaining competition.

### **Statutes Involved**

The pertinent provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13), are as follows:

See: 2(a). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimina-

<sup>5</sup> On this question there is a direct conflict between the Court of Appeals in this case and the United States Supreme Court in the later case of *Rubberoid Co. v. Federal Trade Commission*, May 26, 1952, 96 L. ed. 732, 738-739.

tion may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . .

See, 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished; the burden of rebutting the *prima-facie* case thus made by showing justification shall be upon the person charged with a violation of this section; and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . .

See, 2(f). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

## STATEMENT

### Nature of the Case

The review sought and granted in this case is limited to that portion of the judgment of the Court of Appeals for the Seventh Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating section 2(f) of the Robinson-Patman Act.

Petitioner, the Automatic Chuteen Company of America,

is engaged in the development and leasing of automatic vending machines (called "Canteens"), and in the business of purchasing candy, gum and nuts from the producers thereof and in the resale of these products to its franchise distributors. These Canteen distributors in turn resell the same merchandise to the public by means of vending machines leased from petitioner and located for the most part in factories and industrial establishments (R. 475).

The Federal Trade Commission, on March 19, 1943, issued its complaint against petitioner in two counts. Count I charged that certain conditions contained in the Distributor's Lease and Agreement were violative of section 3 of the Clayton Act<sup>6</sup> (R. 3-7). This phase of the case is not before this Court. Count II charged that petitioner, as a buyer of candy, gum and nuts, knowingly induced and received discriminatory prices in violation of subsection (f) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.<sup>7</sup>

Extended hearings were held before a trial examiner in the course of which 7300 pages of testimony and hundreds of exhibits were adduced on behalf of the Commission. After the Commission had closed its testimony, petitioner filed a motion to dismiss upon the following ground (R. 14-15):

Counsel for the Commission have not proved a *prima facie* case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that respondent, who was the purchaser, "knowingly induced or received" price differentials which made *more* "than due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

<sup>6</sup> Act of October 15, 1914, 38 Stat. 731, 15 U.S.C. 14.

<sup>7</sup> 15 U.S.C. 13(f).

The motion to dismiss was denied by the Commission on January 6, 1948 (R. 15-17).

Petitioner stood on its motion and did not submit evidence or testimony other than on cross-examination.

On June 6, 1950 the Commission issued its findings of facts (R. 473-493), its conclusion upholding the complaint (R. 493-494), its order to cease and desist (R. 494-497), and an opinion (R. 497-504).

The evidence before the Commission showed that petitioner received price differentials from approximately 80 of its 115 suppliers (R. 485); that these differentials resulted from negotiations in which petitioner brought to the attention of its suppliers certain economies created by its methods of doing business and asked them to pass such savings on to petitioner by way of a lower price (R. 362-365, 388-389). All of the suppliers who were queried on the subject testified there were savings in expense in serving Automatic Captain Company naming such categories of savings as packaging, freight, selling expense, no free goods, no credit loss, no returns, etc. (R. 51-52, 54, 63, 64, 66, 67, 80, 84-85, 87, 96, 101, 110, 148-149, 151-152, 163, 164, 201, 206, 209, 215-216, 221, 240-241, 244, 258-260, 266, 268-269, 276, 285-286, 299, 301-302, 310).

On these facts the Commission took the view that a *prima facie* case was made and thereupon found that petitioner knowingly induced and received discriminations in price in violation of 2(f) (R. 494). The Commission said that the mere receipt or inducement of lower prices established a *prima facie* case against the buyer and that the burden of justifying such differentiations on the basis of the sellers' differences in cost then shifted to the buyer, i.e., that the provisions of 2(a) and 2(b) relating to *prima facie* proof apply to the buyer as well as to the seller (R. 503-504).

Petitioner contended that the *prima facie* provisions of the act apply to sellers only; that they were not meant to

apply, and produced an absurd result if applied, in a case against the buyer under 2(f). It contended that if such provisions do apply they amount to a legislative presumption constituting a denial of due process; in that, there is no rational connection between the fact proved, i.e., price differences; and the ultimate facts presumed, viz., differences which actually exceeded the sellers' cost differences and knowledge of such excess on the part of the buyer. Petitioner also contended that the Commission's construction of the statute precluded petitioner from the right to make its defense because it was obviously not feasible for a buyer to go forward with cost justification evidence hidden within the reaches of the accounting books and records and the differing methods of operation of 80 to 115 third-party suppliers of candy bars, nuts and chewing gum.

The Court of Appeals, in affirming the portion of the order under review, said that when subsections (a), (b) and (f) of section 2 of the act are read together there is "no basis in the language of the three subsections for a distinction in their scope as between buyers and sellers" and that the act "places precisely the same burden of proving cost justification upon the buyer" as it does upon the seller (R. 522-523).

With respect to due process, the opinion of the Court of Appeals (1) ignored petitioner's argument regarding legislative presumptions, and (2) held it was foreclosed from asserting it was impossible for a buyer to produce the sellers' cost justifications because petitioner had failed to lay a proper evidentiary foundation for such assertion (R. 523).

Petitioner filed a petition for rehearing (R. 525) and a motion for leave to adduce additional evidence under section 11 of the Clayton Act<sup>1</sup> (R. 534), both of which were

<sup>1</sup> Act of October 15, 1914, 38 Stat. 734, 15 U.S.C. 21.

denied by the Court of Appeals on March 3, 1952 (R. 536).

The facts are developed more fully in the course of the argument.

### **The Importance of the Case**

The Commission's order, affirmed by the Court of Appeals, cuts deeply into the traditional bargaining process between buyers and sellers. It confronts every buyer in interstate commerce with the peril that if, for goods of like grade and quality, he accepts a lower price, he must be prepared to prove that the seller's differential price was cost justified.

The basic issue is whether the American buyer—be he a retailer, wholesaler, or manufacturer—is to be deprived of the time-honored opportunity to bargain over prices.

Under the Commission's order subsection (f) would attach to every buyer in interstate commerce:

where the seller is competing with any other seller for respondent's [the buyer's] business, or where respondent [the buyer] is competing with other customers of the seller (R. 496).

As stated by the Amicus below, "Seklom has an appeal from a Federal Trade Commission order involved more universal and important business consequences than transcend the interest of any individual respondent in a particular Commission proceeding. . . . It would be difficult to examine any aspect of daily business or trade without finding that the rule the court is here considering would have an immediate and comprehensive impact."<sup>8</sup>

The job of buying is vitally important to the success of any enterprise whether it be a manufacturing establishment, a distributor, a department store, or a corner grocery. Everything manufactured reflects in some measure the

<sup>8</sup> Brief of Atlas Supply Co., Amicus Curiae, pp. 1-3.

fabrication of purchased raw materials and the assembly of purchased components.

The industrial purchasing function has been described by one authority as follows:

Purchasing has emerged as a vital and constructive force in management, an essential factor in setting and carrying out company policies, the determining factor in production quotas and accomplishments, the most potent means of achieving economically sound product cost and maintaining a favorable competitive and profit position, a constructive element in public relations, and with economic implications that reach and affect every sector of the national industrial community.<sup>10</sup>

A metropolitan department store in New York, Chicago or Los Angeles buys thousands of separate consumer items for resale, ranging from such durable goods as refrigerators to such fragile objet d'art as fine porcelains and delicate blown glass.

The small business man,—the wholesaler, the retailer, the grocer, the variety store—is in the aggregate the greatest purchaser of all both in number and dollar volume. For hundreds of years he has sought to persuade sellers to reduce prices. This effort to buy cheaply has always been considered beneficial to our economy. It is in fact an essential feature of price competition.

The interpretation upon which the Commission's order is based distorts the ancient principle of the Anglo-American common law and our own statutory system that the bargaining process inherently involves a buyer who seeks to buy as cheaply as possible. Section 2(f) of the Robinson-Patman Act limits this freedom of higgling over the price to the extent of preventing unlawful discrimination resulting from the knowing receipt by a buyer of differential prices which reflect more than cost savings.

<sup>10</sup> Stuart F. Heinritz, Editor of "Purchasing," July, 1948, p. 97.

On that proposition there is no dispute in this case. What is in controversy is an interpretation of section 2(f) which imputes to the Congress an intent to create for the buyer the hazard that he is inducing and receiving a lower price which he cannot cost justify because the data essential to such justification is in the exclusive possession of the seller who grants the price differential. If the buyer must proceed at his own peril unless he can first prove that the seller's lower price is justified by differences in cost, then buyers generally cannot safely continue to bargain in the manner heretofore regarded as the essence of the bargaining process upon which a competitive system depends. The inevitable result for buyers in general would be to seek the legal shelter of a one-price basis as an escape from the legal fiction that the buyer is in as favorable a situation to prove the seller's cost justification as the seller himself.

This reversal of the traditional process of bargaining in commercial transactions presents a substantive and procedural due process issue under the Fifth Amendment. If the Commission and Court of Appeals are right in imputing to Congress an intention to place upon competition the clog that would necessarily result from requiring a buyer to prove the sellers' cost justification, then this Court should decide whether or not such Congressional intention is consistent with due process.

### SUMMARY OF ARGUMENT

This is a case of first impression. It presents a question of statutory construction and a constitutional issue of due process under the Fifth Amendment of paramount importance. The issue is whether the Federal Trade Commission and the Court of Appeals for the Seventh Circuit were correct in interpreting section 2(f) of the Robinson-Patman Act as placing upon the buyer of commodities the burden of proving the sellers' cost justification for lower

prices received by the buyer; and if so, whether such a construction denies due process.

The Court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where purchasers can no longer seek or receive lower prices unless they first produce cost studies from the reaches of the sellers' books, records and differing functional methods of operation.

## I

The construction of 2(f) by the Commission and the Court of Appeals is contrary to the basic philosophy of the act and our competitive system.

~~It is an obvious fact of business life that sellers will not ordinarily provide buyers with detailed knowledge of their business necessary to prove cost justification. Without such aid from the seller, a 2(f) charge under the theory of the Commission and court below is unanswerable by the buyer. Thus, the result is tantamount to a *per se* violation rule . . . [It] converts the language of the act, which recognizes the validity of price differences based on cost savings, . . . into an elusive will-of-the-wisp."~~

The evidence in this case established one fact beyond all doubt—sellers realized savings in cost in selling to petitioner. In such a situation a buyer may, and in fact should, seek different prices for merchandise which involves differences in selling and delivery expense. But if sections 2(a) and 2(b) are made applicable to the buyer in the manner suggested by the court below it would outlaw such practice. It is no answer to say that it is merely *prima facie* illegal and the buyer has an opportunity to rebut it, because the buyer does not have access to rebutting evi-

dence. He is not in a position to know when, how, or to what extent the sales to him may be in violation of the act because he cannot know the amount of cost savings realized by his vendors.

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price *which is prohibited by this section*" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2 which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "*discrimination in price which is prohibited by this section*" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b) which provides that the burden of showing justification shall shift to the alleged violator upon proof of a *prima facie* case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer, not a seller*. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale or delivery; for not until this is shown does the differential become a "*discrimination in price which is prohibited by this section*."

The court's interpretation of the word "knowingly" as used in 2(f) leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that

he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price, that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute." *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 105.

The Commission and the court below relied on seller cases under 2(a).—The rationale of these seller cases clearly repudiates the contention that the buyer has the same burden of proof as the seller. Certainly it cannot be said as in the *Moss* case<sup>12</sup> that the buyer "sets two prices" and "knows why he has done so," or as in the *Morton Salt* case<sup>13</sup> that the buyer "possesses all the data as to costs" of the seller.

The court below construed section 2(b) as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a *prima facie* case shall be "upon the person charged with violation" (R. 523). This construction disregards several factors.

In the first place, the "person" referred to is one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities" furnished under 2(e), i.e., the seller. There is no reference to a buyer or to the knowing inducement or receipt of a price discrimination under 2(f).

Secondly, the meeting competition proviso of 2(b) states "nothing herein contained shall prevent a *seller* rebutting the *prima facie case thus made* by showing . . ." (emphasis supplied). Clearly, the phrase "*prima facie case thus made*" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "a *seller*," Congress intended that

<sup>12</sup> *Samuel H. Moss, Inc. v. F.T.C.*, (C.A. 2); 148 F. 2d 378, 379.

<sup>13</sup> *F.T.C. v. Morton Salt Co.*; 334 U.S. 37, 60.

the first part of 2(b) as well as the second part should be applicable to sellers only. The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment."<sup>14</sup>

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination." The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legislative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.<sup>15</sup> In fact section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.<sup>16</sup> The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.<sup>17</sup>

The Congressional sponsors clearly intended section 2(b) to apply to the seller alone. They said:

Where the information is peculiarly within the knowledge of the party, then the burden shifts to him.<sup>18</sup>

<sup>14</sup> The rule of *expressio unius est alterius* applies. See *Ford v. U.S.*, 273 U.S. 593, 611; 2 Sutherland (3d ed. Horack), Statutory Construction (1943), pp. 412-414.

<sup>15</sup> H.R. 8442; H. Rep. 2287, 74th Cong. 2d Sess., pp. 1-2.

<sup>16</sup> 80 Cong. Rec. p. 6666.

<sup>17</sup> H. Rep. No. 2951, 74th Cong. 2d Sess. p. 8.

<sup>18</sup> 80 Cong. Rec. p. 8328.

Where for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the party . . . then the burden of going forward . . . rests on him.<sup>19</sup>

The legislative history makes it clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission.

## II

The construction by the court below requiring a buyer to prove the sellers' cost justifications violates the Fifth Amendment.

The elements of a case under 2(f) are (1) inducement or receipt of an unlawful price differential, and (2), knowledge by the buyer that such price differential is unlawful. Since the only evidence introduced in this case to support a finding of price discrimination was that petitioner knowingly purchased goods at prices below the prices received by others (R. 484-486), the following presumptions must be made to find violation:

(1) It must be presumed that the differences in price were in fact unlawful differentials and hence discriminations.

(2) It must then be presumed that petitioner knew this fact, i.e., that the differences in price were not cost justified or were otherwise illegal.

This "prima facie" case (creating presumptions of fact thus shifting the burden of proof) must, in order to meet the constitutional requirement of due process, satisfy three tests:

First, there must be a rational connection between the facts proved and the ultimate facts presumed;

<sup>19</sup> 80 Cong. Rec. p. 8452.

Second, a procedural device of this type must not operate to preclude petitioner from the right to present his defense; and

Third, buyers and sellers must not be placed in the same position procedurally where it results in arbitrary and unreasonable discrimination.

Obviously there is no rational connection in the instant case between the fact proved (price differences), and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the sellers' cost differences and knowledge thereof on the part of the buyer. See *Tot v. United States*, 319 U. S. 463. Furthermore, in attempting to apply the *prima facie* provisions of the act to the buyer, the court below seeks to pyramid presumptions. This cannot be done. A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption. *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 330.

If the attempt made here to apply the *prima facie* provisions of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 80 to 115 suppliers. Such presumptions of fact, shifting the burden of proof, cannot thus operate against one who has neither possession nor control of the facts presumed.

The Court of Appeals erred in holding that the present record fails to disclose "impossibility of proof." To meet the Commission's case, that is, to justify the differentials, petitioner would be required to make cost justifications from the books, records and methods of operation of 75 companies not parties to the litigation and against whom

petitioner has no power of compulsory subpoena or process. The court below should have taken judicial notice of the fact that such a feat is impossible.

It is common knowledge that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the sellers' books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretations of records. Surely this Court, with its long familiarity with accounting problems, can take judicial notice of the fact that the science of distribution cost analysis, if one may call it a science, is not well established; that the distribution activities of practically every company differ from those of every other company; that it is necessary to survey all costs and all commodities of a company to ascertain the cost of serving a particular customer or selling a particular commodity; that the success of a study of this sort depends to a great extent on the self-interest of the people who furnish the information and that a seller is not at all likely to give the co-operation to a buyer which is essential in making such a study.

The construction of the act by the court below places buyers and sellers in the same position procedurally even though their positions are completely different. The seller has the knowledge and means to come forward with evidence as to cost justification; the buyer does not. A legislative discrimination so arbitrary and unjust violates the due process clause.

### III

The Court of Appeals erred in granting the Federal Trade Commission's cross petition for enforcement. *Rubroid Co. v. Federal Trade Commission*, May 26, 1952, 96 L. Ed. 732, 738-739 (Adv. Op.).

## IV

Since the court below refused, on wholly technical and procedural grounds, to examine the constitutional question, a case of wide application was decided without consideration of important and possibly determinative issues. Without admitting that the record fails to disclose the impossibility of proof which petitioner put in issue below, it is nonetheless clear that petitioner was unduly prejudiced by reason of the failure to remand the case for a full determination of this question.

## V

The Commission was under an affirmative duty to weigh alternative interpretations of the ambiguous words of the statute which would permit workable methods of administration and enforcement in harmony with the Congressional antitrust policy of maintaining competition. The interpretation of 2(f) by the Commission and the court below sacrifices the essentials of the bargaining process upon which the maintenance of effective competition depends; it will cut deeply into traditional bargaining relationships between buyer and seller in every industry and in every sales transaction. Where there is such a tremendous impact, the record should show that the Commission weighed alternatives and considered the effect of its findings on the competitive system. See *Eastern-Central Motor Carriers Assn. v. United States*, 321 U. S. 194, 209-212.

## ARGUMENT

## I

**The Construction of 2(f) by the Court Below, Requiring a Buyer To Prove His Seller's Cost Justification, Is Clearly Erroneous.**

The court below held that section 2(f) places precisely the same burden upon the buyer, as it places on the seller,

to prove cost justification once the Commission establishes knowing inducement or receipt of a price difference. Accordingly, this case presents the major question of whether in a proceeding against a buyer under 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act apply to the buyer as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

#### A. THE CONSTRUCTION OF THE COURT OF APPEALS IS CONTRARY TO THE BASIC PHILOSOPHY OF THE ACT AND OUR COMPETITIVE SYSTEM.

The construction of 2(f) by the Commission and the Court of Appeals in this case has been characterized as "untenable" and "unwarranted" by Professor Oppenheim, one of the leading authorities in the field of trade regulation and antitrust law. He said:

In construing the language of 2(f) as requiring a buyer to prove his seller's cost savings to justify a price differential he accepted from the seller, the case has introduced an entirely new note of uncertainty into all interstate sales. The Seventh Circuit affirmed the Commission's reading of section 2(f) together with 2(a) and 2(b) to incorporate the *prima facie* case of 2(b) into the provisions of 2(f). This unwarranted construction poses a serious threat to any buyer who accepts a price advantage offered by a seller in the belief that it is cost justified or otherwise permissible under one of the provisions of 2(a). It is an obvious fact of business life that sellers will not ordinarily provide buyers with the detailed knowledge of their business necessary to prove cost justification under the standards established for such proof by the Commission. Without such aid from the seller, a 2(f) charge under the theory of the Automatic Canteen case is virtually unanswerable by the buyer. Thus, the result is tantamount to a *per se* violation rule.

The result converts the language of the act which

recognizes the validity of price differences based on cost savings, the good faith meeting of competition, and other exceptions, into an elusive will-of-the-wisp. It is properly characterized by the words used by Justice Jackson in the *Morton Salt Case*: 'a word of promise to the ear to be broken to the hope.' *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 at 58, 68 S. Ct. 822 (1948).<sup>20</sup>

The court below held in effect, citing the *Morton Salt* case (334 U. S. 37), that since the statute places the burden of proof as to cost justification on the seller, it necessarily follows that "precisely the same burden" rests on the buyer (R. 522). Such a mechanistic rationale is patently unsound; it applies a principle of law, reasoned and sound under one set of circumstances, to an entirely different set of circumstances without analysis as to the application of the rule in the latter situation. The result is unfair and oppressive, not only to the parties involved, but to all buyers and all future litigants under 2(f).

With buyers and sellers placed in the same procedural situation, it is only reasonable to assume that in the future, in order to avoid difficult and lengthy litigations arising in seller cases where cost justifications can be made, the Commission may resort to the easier method of proceeding primarily against buyers. As successive buyers are subjected to cease and desist orders like the one in this case, and as still others attempt to bring their policies into line with such orders, price competition on the basis of increased efficiency in distribution will disappear.

In its place will be a rigid price structure foreign to the philosophy of our competitive system and also contrary to the basic philosophy of the Robinson-Patman Act which was meant to preserve lower prices based on more efficient means of manufacture and distribution.

<sup>20</sup> 50 Mich. Law Rev. 1208, n. 180, June 1952.

This result is reached because the Commission's decision forecloses the petitioner from receiving admitted cost savings. The evidence in this case established one fact beyond all doubt—sellers realized savings in cost in selling to petitioner.<sup>21</sup> However, as a practical matter, the order forbids any differential based on such cost savings inasmuch as it is physically and economically impossible for petitioner, the buyer, to present evidence as to the sellers' cost differences. The result is that petitioner cannot safely accept a lower price on any transaction if that price is known by petitioner to be lower than the price to another even though it is clear that sellers enjoy lower costs of manufacture, service, and delivery with respect to petitioner's purchases. This means that petitioner and the thousands of buyers affected by this decision must buy only at the highest price of any seller.

Thus, although the Robinson-Patman Act was designed to promote competition, not to shackle it, the result of the Commission's order and the opinion of the court below will be to weaken competition by making it impossible for buyers to accept price differences that are entirely legitimate because of undeniable cost savings.

The petitioner in this case operated differently from other types of candy purchasers. It did its buying on an f.o.b. factory basis instead of a delivered price basis (R. 35, 139-140). It purchased candy in the 100 count rough cartons instead of the usual expensive lithographed display boxes of 24 each (R. 34, 35). It dealt direct with the manufacturer's home office and generally there was no field selling expense (R. 34; 35). Petitioner discussed these and other possible savings with its suppliers and asked them to quote on that basis.

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<sup>21</sup> Supra, p. 7.

As stated by Congressman Utterbach in presenting the Conference Report on the Robinson-Patman bill to the House, "There is no limit to the phases of production, sale and distribution in which . . . improvements may be devised and economies of superior efficiency achieved, nor from which those economies when demonstrated may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible."<sup>22</sup>

The legislative history of the act is replete with evidence of the intent of Congress to permit differentials that reflect cost differences "resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered."<sup>23</sup> The House Committee Report said: "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other causes—*none of them are in the remotest degree disturbed by this bill* . . ."<sup>24</sup> (emphasis supplied). They would indeed be disturbed—in fact they would be precluded altogether—if the buyer is prevented from bargaining with the seller. Since it was the purpose of the act to preserve differentials which reflected no more than

<sup>22</sup> 80 Cong. Rec., p. 9559, June 15, 1936.

<sup>23</sup> The report of the Senate Committee on the Judiciary characterized the cost justification provision as "of greatest importance" stating that "it leaves trade and industry free from any restrictions or impediment to the adoption and use of more economic processes, and to the translation of appropriate shares of any savings so effected up and down the stream of distribution to the original producer and to the ultimate consumer." S. Rep. No. 1502, 74th Cong. 2d Sess. p. 5.

<sup>24</sup> H. Rep. 2287, 74th Cong. 2d Sess., p. 17.

the savings it is absurd, it seems to us, to urge that Congress intended (through subsections (a), (b) and (f)) to assert that where a buyer induced or received such a differential he thereby *prima facie* committed an illegal act. These subsections were "not" meant to destroy the time honored principles of bargaining and selling between buyer and seller. Moreover this is a natural economics law that is not subject to congressional or administrative repeal.

"[T]he positions of buyer and seller are by nature adverse."<sup>25</sup>

"The seller of necessity seeks the highest price obtainable for his goods and under conditions of sale most favorable to himself. The buyer seeks to make his purchase at the lowest possible price and under conditions of sale most favorable to the buyer. It is elemental that the position of a seller and a buyer in the same transaction are at opposite poles. Their interests are fundamentally opposed to each other."<sup>26</sup>

"Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities." *Great Atlantic & Pac. Tea Co. v. F. T. C.* (C. A. 3), 106 F. 2d 667, 674, cert. den: 308 U. S. 625.

And yet when the petitioner in this case sought to occupy its elemental and natural position as a buyer, and make the best deal it could within the limits of the act, the Commission and the court below insist it *prima facie* committed an illegal act.

The trouble is that this case, for 7,000 long pages was tried by counsel in support of the complaint upon the theory that there is something *ipso facto* iniquitous in price differentials. This is not so. "Differentials in prices jus-

<sup>25</sup> H. Rep. No. 2287, March 31, 1936, p. 15, in discussing the brokerage provision of the Robinson-Patman Bill.

<sup>26</sup> House Comm. Hearings on Robinson-Patman bills, Feb. 27, 1936, p. 512.

tified by differences in . . . costs . . . have not heretofore been considered as iniquitous, wrongful, or unfair, nor as having any tendency to destroy competition or to foster monopoly. In fact, such price differentials have been regarded as beneficial to the public and not harmful to anyone. . . . The effect upon competition of differences in prices honestly based on differences in selling costs is the normal and natural result of fair competition between merchants whose overhead expenses differ. This type of competition is to be encouraged in the public interest, rather than restrained." *Great Atl. & Pac. Tea Co. v. Errin* (D.C. Minn.), 23 F. Supp. 70, 78.

The term discrimination is sometimes used in the neutral sense which makes it apply to any differential in price between two customers of the same vendor. For a buyer to seek such a discrimination never has been and indeed never could be contrary to law. "Discrimination in prices," says J. M. Clark in his *Studies in the Economics of Overhead Costs*, "has been an ever-present fact, and far from being a violation of any natural economic laws of competition it is one of the natural forms which competition takes" (p. 3). Some kind of discrimination (differential) is inevitable in business. If, for example, a seller were to charge equal prices to all customers, then it would be discriminating against those whose orders involve lower costs or smaller service. Consequently, as Clark remarks, discrimination in the broad sense "needs no elaborate explanation; rather when it is absent, its absence needs explaining" (p. 433).

When, therefore, the complaint of discrimination is raised in any other than a frivolous sense it must be on some ground other than the mere fact that different or unequal prices are charged to different customers.

The discrimination which is improper lies not merely in difference of price, but in differentials which are not

related to some inequality in cost or economic return in the two transactions. A difference in price reflecting such inequality is not undue discrimination simply because it may handicap the less favored buyer in competing with the other.

The conclusion follows that the buyer may, and in fact should, seek different prices for goods which involve differences in costs. But if sections 2(a) and 2(b) are made applicable to the buyer in the manner contended by the Commission and the court below it would outlaw such practice. It is no answer to say that it is merely *prima facie* illegal and the buyer has an opportunity to rebut it, because the buyer does not have access to rebutting evidence. He is not in a position to know when, how, or to what extent the sale to him may be in violation of the act because he cannot know the amount of cost savings realized by his vendors.

The buyer would thus be prevented from seeking to cut down distribution costs which, even back in 1936 when the Robinson-Patman Act was passed, amounted to about 50 percent of the dollar paid by the consumer over the counter.<sup>27</sup> While production costs have fallen in most every line this has not been accompanied by similar economy of distribution. On the contrary, distribution costs have increased. The costliness and wastefulness of our distribution systems are well known. Every advance in production efficiency makes the contrast more obvious:

And in no industry was the distribution system more archaic and wasteful than in the candy industry where the customary jobber method of distribution employed the services of three middlemen between the manufacturer and the consumer. The manufacturer sold to the jobber, the jobber

<sup>27</sup> Malcolm G. McNair, head of the Harvard Bureau of Business Research, Senate Committee Hearings on S. 4171, March 24-25, 1936, p. 3.

245 U. S. 559; *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472; *Manning v. John Hancock Mutual Life Ins Co.*, 100 U. S. 693.

The rule of rational connection between the facts proved and those presumed has been applied in all types of cases, including those involving trade regulation statutes. In *Great Atlantic & Pac. Tea Co. v. Errin*, 23 F. Supp. 70, 82 (D. Minn. 1938), the court held unconstitutional a provision of the Minnesota Unfair Trade Practices Act which provided that "Any sale made by the retail vendor at less than 10 percent above the manufacturer's published list price, less his published discounts . . . shall be *prima facie* evidence of a violation of this act".

In *McFarland v. Amer. Sugar Co.*, 241 U. S. 79, this Court had under consideration a statute of the State of Louisiana intended to prevent a monopoly in the sugar business. The statute provided, among other things, that "any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade . . ." Mr. Justice Holmes, in delivering the opinion of the court, said (241 U. S. at 86-87); "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference shall not be so unreasonable as to be a purely arbitrary mandate . . . The presumption created here has no relation in experience to general facts."<sup>12</sup>

The rule has also been applied in civil cases of various types. In *Western & A. R. Co. v. Henderson*, 279 U. S. 639, for example, this Court set aside a Georgia statute which created a rebuttable presumption of negligence against the

railroad company, when it is made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railway company. The Court said the presumption was arbitrary; that "the mere fact of collision furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company . . . Reasoning does not lead from the occurrence back to its cause." (at pp. 642-643)<sup>49</sup>

The court below in the present case cast "precisely the same burden on the buyer as on the seller," although the buyer does not have the rebutting evidence in his possession or control. In this connection, the case of *Morrison and Doi v. California*, 291 U. S. 82, is particularly pertinent. There the Court had under consideration a California statute which prohibited an alien, who was neither a citizen nor eligible for citizenship, from occupying land for agricultural purposes. The statute provided that where the state proved the occupation or use of the land by the defendant and the indictment alleged his alienage and ineligibility for citizenship, the burden of proving his citizenship or eligibility for citizenship should rest upon the defense.

Defendant Doi, alleged to be an alien, had occupied land under a lease from defendant Morrison, a citizen. Both were convicted of conspiracy to violate the law. This Court in reversing the California courts, made a clear distinction between the permissible burden of proof which might be cast on Doi, the alien, and Morrison, the citizen. It pointed out that in an earlier case,<sup>50</sup> it had held that the State could constitutionally throw upon a defendant the burden of proving citizenship where it had "been proved that he is a member of a race ineligible for citizen-

<sup>49</sup> See also *Manly v. Georgia*, 279 U.S. 1, 5-6; *Bailey v. Alabama*, 219 U.S. 219, 238-239; *Laria v. United States*, 231 U.S. 9, 25-26.

<sup>50</sup> *Morrison v. California*; 288 U.S. 591.

sold to the wagon-jobber, the wagon-jobber sold to the retailer, and the retailer sold to the consumer.

The purpose of 2(f) is clearly set forth in the legislative history as follows: "The closing paragraph of the Clayton Act amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass buyer customers, since it enables him *to charge them with knowledge* of the illegality of the discount, and equal liability for it, *by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.*" (Emphasis supplied.)<sup>28</sup>

There was no proof in this case that any seller told petitioner that the price differential granted it was in excess of the savings; there is, in fact, strong affirmative proof to the contrary (R. 454-462). And the law does not require petitioner to make a searching examination of all the books and records of the vendor for something to cast a suspicion on the legality of the price differential, *U. S. v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 331-332.

#### B. SECTIONS 2(A) AND 2(F) PROHIBIT PLACING ON THE BUYER THE BURDEN OF PROVING SELLER'S COST JUSTIFICATION.

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price *which is prohibited by this section*" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2

<sup>28</sup> Mr. Utterbach in the House after submission of Conference Report, 80 Cong. Rec., p. 9561, June 15, 1936.

which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "discrimination in price which is prohibited by this section" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b), which provides that the burden of showing justification shall shift to the alleged violator upon proof of a *prima facie* case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer*, not a seller. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale, or delivery, for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

To interpret 2(f) otherwise would require a complete rewriting of the section to incorporate within it provisos operating as affirmative defenses. The provisos of section 2(a) specifically apply to sellers only. Any attempt to incorporate in 2(f) by judicial interpretation the provisos of 2(a) is not only contrary to the express language of section 2(f) but produces the absurd result of placing on the buyer the impossible task of proving the seller's cost justification. The mere fact that section 2(a) places the burden of proof on the seller with respect to certain exemptions does not *ipso facto* place upon the buyer in a 2(f) proceeding a similar burden. Had Congress meant to do so, it could easily have added exemptions or provisos to 2(f) specifically applicable to the buyer.

The court below therefore, in order to reach the result it did, was required to rewrite 2(f) in several particulars. It eliminated the phrase "prohibited by this section"; it read into 2(f) the cost justification proviso of 2(a) and the *prima facie* provisions of 2(b); and it interpreted the word "knowingly" to mean merely that the buyer knew he was getting a lower price.

This makes a vastly different statute from the one Congress wrote. A mere price differential was not "prohibited" by Congress; nor was a lower price which can be cost justified.

In the same manner the court's interpretation of the word "knowingly" clearly violates the intention of Congress—in fact, it leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price, that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute".  
*St. Joseph Stockyards Co. v. U. S.*, 187 Fed. 104, 105.<sup>29</sup>

<sup>29</sup> In fact, knowledge is the whole offense under subsection (f), for without knowledge there is no offense, and it is not merely knowledge of price differentials that is the offense but knowledge of a discrimination which is prohibited by subsection (a), i.e., one that reflects more than "differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered".

And so, "justification" has a different meaning as applied to the offense of the seller from what it has as applied to the offense of the buyer. Clearly, under subsection (f) the buyer commits no offense merely in receiving the differential as the Commission and the court below seem to assume. Where the only act pointed to as having been committed by the buyer and proved by the government is that of receiving a lower price, no justification can be required for the simple reason that no offense has been committed.

It seems clear therefore that the rule of statutory construction that the burden of proof under a special exception rests upon the one who claims its benefit is not applicable in this case. The Commission and the court below, however, *relying on cases against sellers under section 2(a)*, contend to the contrary and hold that petitioner, the buyer, has the same burden of proof as a seller. The rationale of these seller cases under 2(a) repudiates this contention.

In *Samuel H. Moss, Inc. v. F.T.C.*, 148 F. 2d 378, 379 (C.A. 2d), a section 2(a) seller case, the court said that "Congress adopted the common device . . . of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result". Only the seller can set two prices and know why he has done so.

In the *Morton Salt* case (334 U. S. 37, 44-45), also a seller case, this Court said that the burden of proof was on the seller because the cost justification proviso of 2(a) was a special exception and because 2(b) "specifically imposes the burden of showing justification on one who is shown to have discriminated in prices". Only a seller can discriminate in price. Mr. Justice Jackson, although dissenting, concurred in the Court's holding regarding the seller's burden of proof. "I agree," he said, "that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the company [the seller], which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification." 334 U. S. 37, 60.

The rationale of these cases fully supports petitioner. Certainly it cannot be said as in the *Moss* case that the *buyer* "sets two prices" and "knows why he has done so", or as in the *Morton Salt* case that the *buyer* "possesses all the data as to costs" of the seller.

### f. APPLICATION OF 2(b) IS LIMITED TO SELLERS

A major prop in the reasoning of the Commission and the court below is Section 2(b) of the act which provides that the burden of showing cost justification shall shift to "the person charged" with a violation of the section. An analysis of 2(b) shows that it was meant to apply to sellers only and that the court below erred in holding that it applies also to buyers.

**Section 2(b) provides:**

Upon proof being made, at any hearing on a complaint under this section, that there has been

*discrimination in price or services or facilities furnished,*

the burden of rebutting

*the prima facie case thus made*

by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order *terminating the discrimination; Provided, however, That nothing herein contained shall prevent a seller rebutting*

*the prima facie case thus made*

by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. (Emphasis added.)

The court below construed the foregoing as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a prima facie case shall be "upon the person charged with violation" (R. 523). This construction disregards several factors.

In the first place, the "person" referred to must be one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities furnished" under

2(e), i. e., the seller. It necessarily follows, as stated by the Third Circuit in *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 106 F. 2d 667, 677, cert. den. 308 U.S. 625, that the language of 2(b) "relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but [is] not applicable to proceedings instituted under paragraphs (c) or (d)". Such a conclusion is required since subsections (c) and (d), like subsection (f), cover prohibitions not mentioned in 2(b). No more than 2(b) applies to 2(c) and 2(d) does it apply to 2(f). In this respect, the decision of the court below seems to be in conflict with the reasoning of the Third Circuit in *Great Atlantic & Pac. Tea Co. v. F. T. C., supra*.

In order to apply 2(b) to a buyer under 2(f) it was necessary for the court below to rewrite the subsection and supply the following italicized language:

Upon proof being made . . . that there has been a discrimination in price or services or facilities furnished *or upon proof being made that there has been a knowing inducement or receipt of a discrimination in price*, the burden of rebutting, etc.<sup>30</sup>

Secondly, the meeting competition proviso of 2(b) states "nothing herein contained shall prevent a *seller* rebutting the *prima facie case thus made* by showing, . . ." (Emphasis supplied.) Clearly, the phrase "*prima facie case thus made*" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "*a seller*", Congress in-

<sup>30</sup> Section 2(b) as first reported by the House Judiciary Committee referred only to "discrimination in price"; then, by Committee amendment, it was enlarged to include discrimination in "services or facilities" (80 Cong. Rec. 8357). If Congress had intended to enlarge it still further to include a knowing inducement or receipt of a discrimination in price, under 2(f), it would have done so at the time by specific amendment.

tended that the first part of 2(b) as well as the second part should be applicable to sellers only.

The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment".<sup>31</sup>

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination". The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legislative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.<sup>32</sup> In fact Section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.<sup>33</sup> The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.<sup>34</sup>

The holding of the court below that the language of 2(b), placing the burden of rebutting a *prima facie* case "upon the person charged with a violation of this section", encompasses buyers as well as sellers ignores this chronology. Section 2(b) could not have been meant to apply to buyers since the only "persons" subject to the act when 2(b) was drafted were sellers. Moreover, the word "seller" as used

<sup>31</sup> The rule of *expressio unius est alterius exclusio* applies. See *Ford v. U.S.*, 273 U.S. 593, 611; 2 Sutherland (3d. Horack), Statutory Construction (1943), pp. 412-414.

<sup>32</sup> H. R. 8442; H. Rep. 2287, 74th Cong. 2d Sess., pp. 1-2.

<sup>33</sup> 80 Cong. Rec. p. 6666.

<sup>34</sup> H. Rep. 2951, 74th Cong. 2d Sess. p. 8.

in 2(b) places a clear limitation on the more general term "person".<sup>35</sup>

Such procedural devices as that set forth in 2(b) for shifting the burden of going forward with the evidence originate in and draw their reasoned strength from elementary common law principles. In upholding these provisions as applied to the seller, the courts have pointed out that he is the one who "sets two prices", "knows why he has done so", and "possesses all the data as to costs".<sup>36</sup>

The Congressional sponsors intended Section 2(b) to apply to the seller alone. They said:

Where the information is peculiarly within the knowledge of the party, then the burden shifts to him.<sup>37</sup>

\* \* \* \* \*

Where for any reason, the evidence to prove a fact is chiefly, if not entirely within the control of the party, . . . then the burden of going forward . . . rests on him.<sup>38</sup>

The legislative history makes it clear that Congress intended in Section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission. Thus, Congressman Patman declared that "the matter of burden of proof" is "a restatement of existing law . . . It is the law of this land."<sup>39</sup> The "law of this land" which Con-

<sup>35</sup> The meaning of descriptive terms of general import such as "any person" must be derived from the "whole act", *U.S. v. Katz*, 271 U.S. 354, 363, and "general and specific words which are capable of analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general", *U. S. v. Baumgartner*, 259 F. 722, 725.

<sup>36</sup> *Moss, Inc. v. F.T.C.*, (C.A. 2), 148 F. 2d 378, 379; *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 60.

<sup>37</sup> 80 Cong. Rec. p. 8328.

<sup>38</sup> 80 Cong. Rec. p. 8452.

<sup>39</sup> 80 Cong. Rec. p. 8442. See also Gilchrist, 80 Cong. Rec. p. 8152; Elkwall, 80 Cong. Rec. p. 8328.

gressman Patman said Section 2(b) was intended to write into the act has never placed such an unfair and oppressive burden of proof on a defendant as the burden which the court below foists upon petitioner in ruling that the buyer must undertake the burden of proving the cost justifications of his various sellers.

Obviously, the buyer has no knowledge of the facts concerning the seller's cost justification in his possession nor does he have them within his control. Inherently, buyers and sellers are at opposite poles—they bargain at arm's length. If anyone knows whether or not a price granted is unlawful, it is the seller.

The court below ignored this clear Congressional intent to apply Section 2(b) to the seller alone. The court apparently took the position that the words of the statute are plain and require no recourse to the legislative history for clarification. The fallacy of this approach where the Robinson-Patman Act is concerned is readily apparent.<sup>49</sup>

Inasmuch as this is the first 2(f) case to reach this Court, we have collected in Appendix A all of the relevant legislative history.

This Court has found it necessary to resort to the legislative history in deciding the various *Robinson-Patman Act* cases which have come before it. See, e. g., *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, at footnote 14. Legislative history was extensively relied upon by the Court

<sup>49</sup> See, e.g., *Rubberoid Co. v. Federal Trade Commission* (C.A. 2) 189 F. 2d 893, 894: "We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." See also *Lindley, J. in United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 677 (E. D. Ill. 1946); "I doubt if any judge would assert that he knows exactly what does or does not amount to violation of the Robinson-Patman Act in any and all instances." Cf. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786 (C.A. 7, 1951).

ing, packing and shipping . . . in the various price categories . . . was determined by a time study of the stockmen's picking operations, the packers' packing operations and the shipping clerks' shipping operations. . . . The time taken to pick, pack and ship each order was clocked to the nearest 1/12 of one minute." *Ibid.* p. 19. From this study the average cost per minute and per order in each price category was determined.<sup>57</sup>

It is obvious that a subpoena duces tecum directed to candy manufacturers on behalf of a buyer, even if allowed, would be ineffectual in obtaining analyses of the types described above. Moreover, a respondent in a Federal Trade Commission proceeding may be denied a subpoena to compel one not a party to the proceeding to produce confidential records. *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d. 511, 520.

### C. THE CONSTRUCTION BELOW RESULTS IN ARBITRARY AND UNREASONABLE DISCRIMINATIONS AGAINST BUYERS

The construction of the act by the court below places buyers and sellers in the same position procedurally even

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<sup>57</sup> A similar analysis was made to find the cost per order invoice. This entailed a study of six operating divisions of three branch sales offices including all of the following expense items: Sales Ledger Bookkeepers Salaries, Remittance Clerks Salaries; Order Register Clerks Salaries; Billing Clerks Salaries; Extension Clerks Salaries; Cost Clerks Salaries; File Clerks Salaries; Mail Clerks Salaries; Sales Distribution Clerks Salaries; Statistical Clerks Salaries; Footwear Order Clerks Salaries; Footwear Stock Control Clerks Salaries; Stenographers and Typists Salaries; Operating Dept. Telephone and Telegraph Toll Expense; Tele-Operating Managers Salaries; Operating Dept. Traveling Expense Salaries; Operating Dept. Telephone and Telegraph Toll Expense; Telephone-Local Expense; Stationery and Printing Expense; Postage Expense; Packing and Shipping Supplies; Furniture and Fixtures—Repairs and Renewals; Depreciation of Furniture and Fixtures; Incidentals; Rent, Light, Water, Heat and Power—Office Expense; Credit Managers and Clerks Salaries; Credit Dept. Traveling Expense; Credit Dept. Commercial Agency Expense; Credit Dept. Legal and Collection Fees; Credit Dept. Telephone Toll Calls and Telegraph. Dkt. 4972, Ex. I, pp. 32-36.

in the recent case of *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384.<sup>41</sup>

In the present case, the Court is dealing with a statute which is "inescapably ambiguous" (in the words of Mr. Justice Jackson, concurring with Mr. Justice Minton in the *Schwegmann* case) and the legislative history makes it plain that Congress intended only to restate the existing "law of the land" as to burden of proof<sup>42</sup> and not to enact such an unusual, and unprecedented, procedural requirement as the one that a buyer who accepts a lower price from a seller does so in peril of being required at a later date to justify the seller's cost data—data which is necessarily in the possession of the seller, not the buyer.

We submit that the fundamental rules of fair procedure which place on the party who knows the facts the burden of going forward with the evidence, as developed by the courts<sup>43</sup> and restated by Congress in 2(b), govern this case and require this Court to reject the construction of 2(f) by the court below.

## II

### **The Construction by the Court Below Requiring a Buyer to Prove the Sellers' Cost Justifications Violates the Fifth Amendment.**

We have shown in the foregoing pages that the construction of the act by the court below, placing the burden of

<sup>41</sup> In Appendix B we have analyzed the rules of burden of proof as developed and applied by the courts. This analysis demonstrates that the compelling consideration causing the creation of presumptions (which shift the burden of going forward with the evidence) is that the facts are accessible to one of the parties but not to the other. This was the basis on which Congress rested section 2 (b) and the basis upon which the courts have justified placing the burden on sellers.

<sup>42</sup> "Where a statute purports to restate the existing common law, the latter becomes an especially important factor in determining legislative intent." 3 Sutherland (3d. ed. Horack), *Statutory Construction* (1943), p. 7. ". . . treatment of statutes on procedure should be with reference to the previous common law in the federal courts." *Ibid.*, p. 12.

though their positions are completely different. The seller has the knowledge and means to come forward with evidence as to cost justification; the buyer does not. A legislative discrimination so arbitrary and injurious violates the due process clause of the Fifth Amendment.

In *Yu Cong Eng v. Trinidad*, 271 U.S. 500, the constitutionality of the so-called Chinese Bookkeeping Act was in issue. Under that act it was made unlawful for any merchant doing business in the Philippine Islands "to keep its account books in any language other than English, Spanish or any local dialect." Petitioner, on behalf of all Chinese merchants, contended that the act would deprive them "of their liberty and property without due process of law. . . ."

The evidence showed that Chinese merchants "could not comply with the act." As stated by the Court, there were 85,000 merchants in the Philippines to whom the law applied, 1200 of whom were Chinese; "comparatively few of the Chinese speak English or Spanish or the native dialects with any facility at all, and less are able to write or to read"; enforcement of the Act "would seriously embarrass all of them and would drive out of business a great number."

It was held that the impossibility of compliance by a particular class of merchants with a statute of general application to all merchants, was repugnant to the due process clause (271 U. S. 500, 524-525).<sup>58</sup>

Thus a regulation valid "in given circumstances" may be invalid "under other circumstances" because it operates unreasonably. *Nebbia v. New York*, 291 U. S. 502, 525.

So it is in this case. Just as Chinese merchants were in a different position from others, so are buyers in a different position from sellers. It is lawful in many instances for buyers to accept lower prices, and to force them to justify

<sup>58</sup> See also *Morrison and Doi v. California*, 291 U.S. 82, 93.

proving a seller's cost justification upon the buyer, is contrary to the language of the act, its legislative history, and the purpose of the act.

In addition, such a construction would render 2(f) unconstitutional as a denial of due process of law in violation of the Fifth Amendment.

The elements of a case under 2(f) are (1) inducement or receipt of an unlawful price differential, and (2) knowledge by the buyer that such price differential is unlawful. Since the only evidence introduced to support a finding of price discrimination was that petitioner knowingly purchased goods at prices below the prices received by others (R. 484-486), the following presumptions must be made to find violation:

- (1) It must be presumed that the differences in price were in fact unlawful differentials and hence discriminations.<sup>43</sup>
- (2) It must then be presumed that petitioner knew this fact, i.e., that the differences in prices were not cost justified or were otherwise illegal.

This "prima facie" case (creating presumptions of fact thus shifting the burden of proof) must, in order to meet the constitutional requirement of due process, satisfy three tests:

First, it is unconstitutional to throw the burden of rebuttal upon a defendant unless there is some rational connection between the facts proved and the ultimate facts presumed;

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<sup>43</sup> Differentials in price are not *per se* discriminations. "The Act," said the Supreme Court, "does not prohibit all . . . discounts . . . Congress refused to declare flatly that they are illegal. . ." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 713, 745-746.

Secondly, it is unconstitutional to throw the burden of proof upon a defendant where such a procedural device is oppressive and unjust, precludes the petitioner from the right to present his defense, and creates in effect a conclusive presumption; and

Thirdly, it is unconstitutional to place buyers and sellers in the same position procedurally where it results in arbitrary and unreasonable discrimination.

A. THERE IS NO RATIONAL CONNECTION BETWEEN THE PROVEN FACT OF PRICE DIFFERENCES AND THE DOUBLE PRESUMPTION THAT SUCH DIFFERENTIALS WERE (1) UNLAWFUL, AND (2) THAT PETITIONER KNEW THIS FACT.

Statutes like the Robinson-Patman Act creating artificial presumptions of fact and making one fact *prima facie* evidence of another, are by no means new or even modern. Where they are reasonable and where there is a rational connection between the fact proved and the ultimate fact presumed, they have long been recognized and enforced by the courts.

On the other hand where they are unreasonable and arbitrary the courts have been quick to strike them down.<sup>44</sup>

The function of such statutes has been said to be "to make it possible to convict where proof of guilt is lacking". *Pollock v. Williams*, 322 U. S. 4. In fact, of recent years there has been such a marked increase in the creation of this statutory device as to suggest not only a design to minimize the labor of investigators and prosecutors but a trend—supported by some judicial dictum that there are

<sup>44</sup> *Tot v. United States*, 319 U.S. 463; *State v. Kelly* (1944), 218 Minn. 247, 162 ALR 477, 15 N.W., (2d) 551; *Great Atlantic & Pac. Tea Co. v. Ervin*, 23 F. Supp. 79; *Morrison v. California*, 291 U.S. 82; *McFarland v. Amer. Sugar Ref. Co.*, 241 U.S. 79; *Western & A. R. Co. v. Henderson*, 279 U.S. 639; *Monley v. Georgia*, 279 U.S. 1; *Bailey v. Alabama*, 219 U.S. 219.

no vested rights in rules of evidence—to consider the rights of individuals as secondary to the demands of society.<sup>45</sup>

Statutes of this nature are of two general types: those creating conclusive presumptions of law or fact; and those creating rebuttable presumptions or "prima facie" proof such as section 2(b) of the Robinson-Patman Act as applied to a seller.<sup>46</sup> Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.<sup>47</sup> Those of the second type have met a varying fate, some ~~withstanding~~<sup>48</sup> and others succumbing to attacks on diverse grounds. It would be redundant to undertake a complete review and analysis of the decisions passing upon the validity of such statutes in view of the many exhaustive opinions and commentaries which can be consulted for the purpose.<sup>49</sup>

The test of rational connection in testing *prima facie* proof was first enunciated by this Court in 1910 in the case of *Mobilgas J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35. Since then it has been applied many times, with varying results, in civil as well as criminal cases. The latest pronouncement on the subject is *Tot v. United States*, 319 U. S. 463. This decision laid down the clearest and best enunciation of the test of rational connection we have had so far and there can be but slight doubt that it will be quoted as the model formulation of the rule in many later cases just as the *Turnipseed* case has been quoted in countless cases during the last 35 years.

The Court in the *Tot* case had under consideration the validity of section 2(f) of the Federal Firearms Act, 15

<sup>45</sup> See Brosman, The Statutory Presumption, 5 Tulane L. Rev. 178; Chamberlain, Presumptions as First Aid to the District Attorney, 14 ABA Jour. 287; O'Toole, Artificial Presumptions in the Criminal Law, 11 St. John's L. Rev. 167.

<sup>46</sup> See 20 Am. Jr. Evidence, see, 10.

<sup>47</sup> These are collected in annotations at 162 ALR 495, 86 ALR 179 and 51 ALR 1139.

U. S. C. sec. 902(f), which provided: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by any such person in violation of this Act."

The Government's evidence was limited to proof of Tot's prior conviction on an assault and battery charge, his plea to a burglary charge, and that in 1938 he was found in possession of a loaded automatic pistol.

The question up for decision was the power of Congress to create the presumption that "From the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed: (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute." 319 U. S. at 466.

In sustaining the contention that the statute failed to meet the tests of due process Mr. Justice Roberts, speaking for a unanimous court, said:

The rules of evidence . . . (are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . The government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first

is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of a lack of connection between the two in common experience.<sup>48</sup>

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the sellers' cost differences and *knowledge thereof* on the part of the buyer.

Furthermore, in attempting to apply the *prima facie* provisions of the act to the buyer, the court below seeks to pyramid presumptions. It first presumes that the price differentials exceeded the cost differences. Based upon this first presumption it then presumes further or secondly that petitioner had knowledge of this fact. Presumptions cannot be pyramided. *Allen v. Trust Co. of Georgia*, 149 F. 2d 120; *Standard Accident Ins. Co. v. Nicholas*, 146 F. 2d 376; "A presumption must be based upon facts proven by direct evidence and cannot be based upon nor inferred from another presumption." *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 330. See also *Greer v. U. S.*,

<sup>48</sup> In a searching analysis of the *Tot* case (56 Harvard-Law Rev. 1325), Professor Morgan said there was "ample justification" for the Supreme Court's holding, pointing out that "whether one fact forms a basis for a rational inference of another depends upon the relationship between them in human experience." The court may be convinced, he said, "that the legislature in a given case is not purporting to exercise a judgment as to the relationship in experience between two facts, but is using a formula expressing such relationship in order to accomplish quite another purpose. If so, then it may well ignore the expression and insist that, however desirable the purpose, it must not be accomplished by illegitimate means."

ship"; this holding, said the Court, was based upon the fact that defendant "could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless." 291 U. S. 82, 87-88. But, said the Court, in this case the California courts "have cast the *same burden upon both* [Doi, who is alleged to be ineligible for citizenship, and Morrison, the citizen]; and both have been convicted"; plainly, "as to Morrison, an imputation of knowledge is a wholly arbitrary presumption . . ." 291 U. S. 82, 92.

The same vice inheres in the construction of the statute by the court below which cast "the same burden" upon both sellers and buyers. While that burden may be reasonable as to sellers, it is wholly arbitrary when applied to buyers.<sup>51</sup>

#### B. TO PLACE THE BURDEN OF COST JUSTIFICATION UPON A BUYER CREATES A CONCLUSIVE PRESUMPTION; PETITIONER IS PRECLUDED FROM THE RIGHT TO PRESENT HIS DEFENSE TO THE MAIN FACT PRESUMED.

While the test of comparative convenience of producing evidence was rejected as an independent test in the *Tot* case,<sup>52</sup> it has been the subject of considerable discussion. 162 A. L. R. at p. 511. It has been applied only (a) where the defendant has more convenient access to the proof, and (b) where requiring him to go forward with such proof will not subject him to unfairness or hardship.

In the *Turnipseed* case the Court, after stating that the validity of a legislative presumption depends on a rational connection between the fact proved and the ultimate fact presumed, said (219 U. S. 35 at 43):

So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude a party from the right to present his defense to the main fact presumed.

<sup>51</sup> See also *infra*, pp. 52-54.

<sup>52</sup> 319 U. S. 463, 466.

The foregoing quotation is directly in point. If the attempt made here to apply the *prima facie* provision of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings, and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 80 to 115 suppliers.

Such presumptions of fact, shifting the burden of proof, cannot thus operate against one who has neither possession nor control of the facts presumed. In *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, the plaintiff asked the court to shift the burden of proof on the basis of a presumption that Firestone, who rented a storage tank from plaintiff but left it under plaintiff's control, was negligent. The court said flatly "There is no direct evidence as to how the gasoline which overflowed from the storage tank became ignited . . . [P]roof of the fire cannot give rise to a presumption of negligence on the part of one [Firestone] who was neither in possession nor control of the instrumentality which produced the casualty" (p. 329). See also *Lynch v. Nine-mile Packing Co.*, 63 Wash. 423, 115 P. 838; *Clark v. Detroit & M. Ry. Co.*, 197 Mich. 489, 163 N.W. 964.

In *Heiner v. Donnan*, 285 U.S. 312, 329, this Court had under consideration a statute which provided that any transfer of property made within two years prior to death shall be deemed and held to have been made in contemplation of death. The Court held that the statute violated due process whether "treated as a rule of evidence or of substantive law." A statute, said the Court, "creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause."

The foundation upon which the above principles are predicated is common fairness, i.e., due process of law; but another basis for the rule against conclusive presumptions,

of fact is found in the inherent nature of the judicial process:

The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. *To forbid investigation is to forbid the exercise of an indestructible judicial function.* IV Wigmore on Evidence (3d ed. 1940) pp. 715-716. (Emphasis added.)

Consequently, adds Dean Wigmore, ". . . a Legislature's attempt to interfere with the Judiciary's powers by forbidding investigation of facts, though declaring certain testimony or other evidential data to be conclusive, is invalid. In [this] class would belong statutes which, while plainly recognizing one fact as still dominant in the substantive law, and not desiring to change it, should make another fact conclusive proof of it." Ibid at 720.

The Robinson-Patman Act plainly recognizes and preserves "one fact as still dominant in the substantive law," namely, that price differences are not unlawful discriminations if cost-justified. But—and this is the error—the construction urged by the Court of Appeals would impute to the Congress an intent to "make another fact" (mere receipt of a price differential) conclusive proof of violation of the substantive law by denying to the courts their "indestructible judicial function" to ascertain the facts.

A statute compelling a party to produce proof not in his possession or control is surely subject to constitutional attack. However, the court below refused to pass on this important question, saying that petitioner had "laid no foundation for its assertion . . . that cost justification was impossible of proof by a buyer," citing *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352-53, and *Tennessee Consolidated Coal Co. v. Comm.*, 117 F. 2d 452 (R.

523). These cases are not in point. *There the petitioner was in full possession of all the facts but refused to put them in evidence.*

We think the Court of Appeals clearly erred in holding that the present record failed to disclose the "impossibility of proof". The Commission introduced records and summaries of records covering a ten year period showing the prices at which more than 75 manufacturers sold their candy, gum and nuts to petitioner and to others (R. 498). The volume sold to petitioner during this period covered hundreds of different types of candy bars and amounted to millions of dollars; the volume sold to others totaled several hundred millions of dollars (R. 484-486, 491). To meet this, petitioner, the buyer, would be required to make cost justifications for 750 years (10 years x 75 suppliers) from the books, records and operations of companies not parties to the litigation and against whom petitioner has no power of compulsory subpoena or process.

This Court should take judicial notice of the fact that such a feat is impossible. It is common knowledge, moreover, that distribution cost accounting is far from an exact science, that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the seller's books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretation of records.<sup>53</sup> Obviously

<sup>53</sup>The courts will take judicial notice of facts which are well and universally known without particular proof being adduced in regard to them, and also with reference to those dealings of the commercial world which are of like notoriety. *Schollenberger v. Pennsylvania*, 171 U.S. 1. See also *Minnesota v. Barber*, 136 U.S. 313, 321; *Phillips v. Detroit*, 111 U.S. 604, 606.

The category of matters of which courts will take judicial notice is not a closed one, and judicial notice may be taken of a new fact if it is sufficiently notorious. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 391 U.S. 292.

these things can be done only by employees of the seller who are familiar with the seller's methods of operation.

"Detailed cost figures are among the most confidential of financial data, and the idea of submitting them to audit by the customer is contrary to all accepted rules of good business practice". Purchasing 361, Prentice Hall 1947.

It would seem to stretch credulity beyond reasonable limits to suggest, as the court below suggested, that there is no showing "on the record in this case" that proof by the buyer (of 80 to 115 sellers' cost differences) "is not available, or is impossible" (R. 523).

Surely this Court, with its long familiarity with accounting problems, can take judicial notice of the fact that the science of distribution cost analysis, if one may call it a science, is not well established; that while manufacturing cost determination has been reasonably well understood and recognized for many years, this has not been true in the distribution cost field; that the distribution activities of practically every company differ from those of every other company and what is suitable for one company in the way of distribution cost analysis might not fit the situation of another company; that it is necessary to survey all costs and all commodities of a company to ascertain the cost of serving a particular customer or selling a particular commodity; that the success of a study of this sort depends to a great extent on the self interest of the people who furnish the information and that a seller is not at all likely to give the cooperation to a buyer (a third party) which is essential in making such a study.<sup>54</sup>

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<sup>54</sup> In *Baltimore & O. C. Terminal R. Co. v. Becker Milling Machine Co.*, 272 Fed. 933, it was held that the court knows from common knowledge that the expenses of maintaining engineering and experimental departments in factories as well as the expenses of superintendence and all other proper items of overhead, must be apportioned to product and charged as parts of manufacturing cost.

In order to show the difficulties which confront a company (i.e. the seller) in making a distribution cost analysis, we attach as Appendix C excerpts from an article by William Edgar Thomas, Jr., entitled "Accounting as an Aid to Compliance With the Robinson-Patman Act."<sup>55</sup> The author, after pointing out that general accounting analyses made for management are unsuitable for the purpose of supporting price differentials under the Robinson-Patman Act (p. 6), says (pp. 7-9):

The accountant who must establish legal price differentials has a difficult task . . . [He] will find little help in a study of the few cases which have been settled . . . In any case, the accountant will include or exclude [item of] cost on the basis of his ability to demonstrate a causal relationship between the cost and the allocation unit which is the product-customer. At one extreme are costs which unquestionably may be included because they can be traced definitely to the product sold to the customer. An example would be freight-out. At the other extreme are costs which will probably be excluded . . . because of the difficulty or impossibility of . . . proving even an indirect relationship between the cost and the unit . . . Examples of this type are the cost of public relations work, and the directors' fees.

In analyzing distribution costs . . . the first step is . . . to define the functions and the sub-functions . . . The second step is to find the cost of carrying out each sub-function. This cost is the total of the portions

<sup>55</sup> An abstract of a thesis submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Accounting in the Graduate School of the University of Illinois, Urbana, Illinois, 1944.

of the primary costs which apply to the sub-function, . . . When the sub-function cost has been ascertained, the next step is to allocate that cost to the allocation unit, which is the product-customer. . . .

On a subject as complex as distribution, it is impossible to consider all possible cases which may require modifications of general statements. With this in mind, a list of distribution sub-functions are given (see chart, pages 16-22) with their bases of allocation to the allocation unit. The sub-function is listed first, next, the order of allocation (that is, whether the cost is allocated first to the customer and then to the product, or first to the product and then to the customer), then the basis for making the first allocation, and finally the basis for making the second allocation.

The chart referred to lists 27 separate items of expense, which range from such obscure items as sales costs (which vary with mileage, time spent in travel, time spent in selling) and invoice costs (which vary with the number of typed lines per invoice), to such clear-cut items as delivery expense.

The author distinguishes between attempts to justify price differentials which have already been given and the construction of new price schedules. Obviously the former is the more difficult because the cost allocations must be related back to the period in which the alleged discrimination took place. However, the latter seems complicated enough. In building up a new straight discount schedule, for example, the author suggests that the accountant should go through the following steps (p. 10):

- (1) a critical survey of all manufacturing and distribution costs, (2) the determination of costs which may be considered costs of manufacturing, selling, and

delivery within the meaning of the Robinson-Patman Act, (3) the determination of the proper basis (if one can be found) for allocating each cost to the allocation unit which is the customer-product, (4) a classification of customers, i.e., a definition of the class of customer which is to use the discount schedule, (5) the determination of the costs listed in number 2 which may be included in the scheduled computation when the class of customer is considered, (6) the allocation of the costs chosen in step number 5 to a cost for each order, then the study of the variations of each cost with variations in the quantity of goods ordered and delivered, (7) the fixing of the brackets at points of break in the total cost curve for increasing quantities of goods ordered and delivered, (8) the conversion of the cost differences between brackets to a percentage of the base selling price because price schedules are customarily set up as percentages of a list price.

In describing the construction of "functional" price schedules for different classes of customers,<sup>56</sup> the author refers to the "growing complexity of the system of distribution", and points out that the discount schedules must be based upon cost differences which vary with the functions performed (pp. 12-13).

In one typical Federal Trade Commission case a seller, in order to cost justify a price differential of 22 percent, found it necessary to make many studies to obtain cost accounting data which were not kept in the regular course of business. In the Matter of *United States Rubber Co.*, Dkt. 4972, Ex. I, p. 13. For example, a time study was made to determine the cost of packing and shipping for customers in various price brackets. "The branch labor cost of pick-

<sup>56</sup> That is, classes of customers other than the "old classification of manufacturer, wholesaler, retailer and consumer."

such differentials in the same manner as sellers is to impose an arbitrary requirement without regard to the different circumstances of the two classes. And just as the Book-keeping Act would be "oppressive and damaging" to Chinese merchants so would the imposition of the burden of cost justification be to buyers since they would be forced because of impossibility of proof to discontinue the making of lawful contracts. "The Legislature may not," said the court, "under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations." 271 U. S., 500, 526.

The purpose of the Robinson-Patman Act is to allow the granting or receiving of price differentials which make due allowance for cost differences. If a buyer is saddled with the impossible burden of showing his seller's costs, all differentials will be outlawed. Such a "dragnet" construction of the Act—spreading "an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught"—violates the due process clause. *Tyson & Brothers v. Bapton*, 273 U. S. 418, 443; *Heiner v. Donnan*, 285 U. S. 312, 328; *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 8-9.

### III

#### **The Court of Appeals Erred in Granting the Federal Trade Commission's Cross Petition for Enforcement**

Petitioner contended below, relying primarily on the case of *Rubberoid Co. v. Federal Trade Commission*, (C.A. 2), 191 F. 2d 294, that the Commission was not entitled to an enforcement order on cross petition in the absence of a showing that violation has occurred or is imminent. The court below conceded that the *Rubberoid* case supported

petitioner's contention in this respect but refused to follow it (R. 524).

Since the entry of the opinion and decree below this Court affirmed the *Rubberoid* case and explicitly held that proof of disobedience is a prerequisite to the judicial enforcement of a Federal Trade Commission order, in view of the clear language of section 11 of the Clayton Act (15 U.S.C. 21), May 26, 1952, 96 L. Ed. 732, 738-739 (Adv. op.).

#### IV

**Since the Court Below Refused, on Procedural Grounds, to Examine the Constitutional Question, a Case of Wide Application Was Decided Without Consideration of Important and Possibly Determinative Issues..**

Petitioner sought to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 534).<sup>59</sup> On a narrow legal technicality, the court below denied petitioner's motion (R. 536). It held that the present record failed to show such "impossibility" of proof, while simultaneously denying the petitioner the right to enlarge the record to deal with the question.

At the very least, even if the Commission's interpretation of the statute should be sustained by this court, the substance of due process requires the Court to recognize that foreclosure of proof that it is impossible for a buyer to show a seller's cost justification makes historic business relationships between sellers and buyers depend for their legality upon a highly technical choice *in limine* of a statu-

<sup>59</sup> Petitioner filed a motion for leave to adduce additional evidence (R. 534) under section 11 of the Clayton Act (15 U.S.C. 21) which provides that "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission . . . , the court may order such additional evidence to be taken

tory construction, which even this Court may find extremely difficult to decide in the search for the Congressional intent.

Without admitting that the record fails to disclose the impossibility of proof which petitioner put in issue before the Commission and the reviewing court below, it is nevertheless clear that petitioner was unduly prejudiced by reason of the failure to remand the case to the Commission for a full determination of this question.

## V

**The Commission Was Under an Affirmative Duty to Weigh Alternative Interpretations of the Ambiguous Words of 2(f) Which Would Permit Workable Methods of Administration and Enforcement in Harmony With the Congressional Antitrust Policy of Maintaining Competition.**

The Commission's interpretation of 2(f), affirmed by the court below, was made without record evidence that the Commission had given due consideration to alternative interpretations reconcilable with the antitrust policy of the Congress. This is more than a matter of mere administrative discretion. It goes to the essence of the Constitutional safeguards of due process because of the arbitrary and oppressive burden of proof petitioner, and buyers as a class, would be required to assume under the unreasonable interpretation here in issue.

Since the Commission's interpretation of 2(f) sacrifices the essentials of the bargaining process upon which the maintenance of effective competition depends, it should be set aside by this Court unless the Commission can show that such was the unmistakable and sole intention of the Congress.

In order to avoid the "untenable" and "unwarranted" construction by the Commission of 2(f) in this case, Pro-

essor Oppenheim has suggested (50 Michigan Law Review 1208-1209) that the subsection

be revised by incorporating . . . a prohibition upon a buyer's knowing inducement or receipt of prohibited discriminations in price, subject to the limitation that the buyer shall not be required to prove his seller's cost justification. To enable cost justification to be brought into a proceeding in which a buyer is made a respondent, the revised 2(f) should also provide that in a proceeding against a buyer, the Commission shall be required to join as a party respondent, either the seller, if a single seller is involved, or, as is more likely to be the case, a representative group of sellers.

If a seller fails to appear and defend or fails to sustain the burden of proving cost justifications, then the buyer would be free from liability unless the Commission further shows that the buyer acted either with actual knowledge of lack of cost justification, or with knowledge of such circumstances as to make his inducement or receipt of differential prices amount to bad faith or collusive conduct with the seller. . . .

These suggestions are made because in every instance the buyer is charged with liability only when the Commission has evidence that the seller or sellers have probably granted unlawful discriminatory prices. As matters now stand, the Commission places an indefensible burden of proof upon the buyer when it proceeds against the buyer alone. The burden of proving cost justification should be placed upon the seller, since he is the only one who possesses the evidence relevant to that defense. Common sense and daily observation of business purchasing activities demonstrate that buyers generally do not have the means of proving sellers' cost justifications.

The foregoing suggestions would constitute statutory recognition of the traditional "hard bargaining" process by which the buyer is entitled to procure the cheapest price consistent with savings arising from economy and efficiency. Buyer liability would arise only when there is knowing inducement or receipt by

the buyer of differential prices that amount to price discrimination because of lack of cost justification.

These valuable suggestions for a workable statute do not require Congressional revisions; they could just as readily be adopted by the Commission as alternative interpretations consistent with both the present language of 2(f) and the Congressional intent. It is apparent from a reading of Professor Oppenheim's article that he suggests statutory revision only because of the Commission's arbitrary interpretation in the instant case. After analyzing the position of the Commission and the court below, he said: "The result converts the language of the act, which recognizes the validity of price differences based on cost savings, the good faith meeting of competition, and other exceptions, into an elusive will-of-the-wisp." (50 Michigan Law Rev. 1208, Note 180).

Petitioner has already noted that the outcome of this proceeding will cut deeply into traditional bargaining relationships between buyer and seller in every industry and in every sales transaction. Where there is such a tremendous impact, the record should show that the Commission weighed alternatives and considered the effect of its findings on the competitive system.

The situation presented herein is analogous to that which this Court considered in *Eastern-Central Motor Carriers Assn. v. United States*, 321 U. S. 194. In that case, the Court rested its decision firmly upon an analysis of whether the Interstate Commerce Commission had determined motor-carrier rates in accordance with the standards set forth for its guidance in the National Transportation Policy.

A majority of the Court reversed the District Court principally upon the failure of the Interstate Commerce Commission to base its findings upon a record that would enable the Court to determine whether or not the Commis-

sion had given proper consideration to all factors involved in the application of the standards set forth in the statute. In the unsatisfactory state of the record, the Court insisted, it was impossible to perform its function as a reviewing tribunal "without further foundation" than was made. The case was remanded to the Commission in order that it might fill in the gaps left in the sketchy reports, with an accompanying disavowal that the Court had any purpose to instruct the Commission concerning the result it should reach:

In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does . . . Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours. (321 U. S. at pp. 211-212.)

In the case at bar, the Federal Trade Commission was dealing with a new policy formulated for the first time.<sup>69</sup>

<sup>69</sup> The court below said that counsel had informed it that this was the first court test of a buyer's liability under section 2(f), and then added "although there have been numerous proceedings theremider before the Commission" (R. 521). This incomplete statement leaves a misleading impression. In the eleven other cases in which the Commission has issued orders against buyers under 2(f), seven were uncontested proceedings (Nos. 3154, 3161, 3377, 3843, 5027, 5618, 5794), and the remaining four did not litigate the issues involved in the present review (Nos. 3820, 4548, 4957, 5771).

In such a case of first impression, when a question of public policy of such far-reaching importance is being decided, there is an inescapable duty resting upon the Commission to give "due consideration of the factors involved" and with "sufficient explication" to enable the courts to determine the basis on which the Commission acted.

Just as in the *Eastern Central* case the Court was dissatisfied with the failure of the Interstate Commerce Commission to measure up in that proceeding to its enlarged responsibilities under the Transportation Act of 1940, so here this Court should be equally concerned about the failure of the Federal Trade Commission to show awareness of its increased responsibilities as a regulator of forms of price competition never heretofore committed to its control.

### **CONCLUSION**

It is undeniable that the word "discrimination" cannot be a talismanic word of illegal conduct by a mechanical and literal interpretation. The Commission and the courts have recognized in every, Robinson-Patman Act proceeding that the term "discrimination" is *not* synonymous with a price differential.

Inequality is the essence of discrimination. As Mr. Justice Frankfurter pointed out in a different factual situation, but nevertheless by way of a situation applicable to this case, "The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals". *New York v. United States*, 331 U. S. 284, 353.

The bargaining process historically has recognized that unequal arise by reason of savings resulting from economy and efficiency imputable to the method or the quantity by which some purchasers buy as against less efficient and less economical methods by which other purchasers buy or take delivery.

In this case, the Commission and the Court of Appeals arbitrarily assumed that such differences must be cost justified by the buyer. In so ruling, both tribunals assumed that this is the one and only interpretation which conforms to the Congressional intent. If the ruling remains in effect, then the petitioner and all buyers similarly situated will be faced with a peril of being held in violation of the act *per se* whenever they knowingly accept prices lower than those of their competitors.

This case may seem to present the bare procedural question as to whether the burden of justification shifts to the buyer after the Commission has shown "knowing" receipt of a lower price. Technically that is the legal question posed by the case, but its answer raises broad substantive problems with major commercial, social and consumer implications.

The whole history and pattern of purchasing—whether the purchaser be the housewife, the lawyer buying law books, the small merchant acquiring goods in the market place, the relatively small interstate concern such as petitioner, or the very large manufacturing or distributing concern—demonstrate that all seek a lower price. The commercial buyer often advances reasons why he should receive a more attractive price—that is his job, and his whole training and competitive experience. Surely our trading system has not become so stagnant by virtue of the Robinson-Patman Act that the buyer must now say to the seller: "Are your prices too low?—Be sure now not to give me too good a price". That is precisely what the views of the Federal Trade Commission add up to in this case.

If the United States is to follow the road of certain other countries where the merchant is literally just a shopkeeper or a mere "stockist"; with no virility in buying or selling, then Congress should say so in unmistakable statutory lan-

age. Certainly it turned no such sharp corner in its enactment of section 2(f) which was a Senate floor amendment adopted without debate or other serious legislative consideration.

For the above reasons it is respectfully submitted that judgment of the court below should be reversed.

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## APPENDIX A

### **Legislative History Shows That Only Sellers Were Meant to Be Subjected to Burden of Proof as to Cost Justification.**

Without resort to a "pick and choose" process, *all* of the pertinent legislative history supports the proposition that *only sellers* were meant to be subjected to the burden of proof as to cost justification.

#### *1. Legislative history of 2(b).*

Section 2(b) was in the original House Bill (H. R. 8442).<sup>61</sup> Senator Moore offered it as a floor amendment to the Senate Bill (S. 3154), stating its purpose and effect as follows:

... : The amendment merely provides that if they [referring to sellers of milk] charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification. . . .<sup>62</sup>

In addition to stating that its application was to sellers, Senator Moore requested that the amendment be inserted immediately following section 2(a) which deals exclusively with discriminations in price by sellers.<sup>63</sup>

The amendment, section 2(b), was agreed to without debate<sup>64</sup> and was not thereafter discussed in the Senate.

The uniform explanation as to the basis of the procedural rule 2(b) was as follows:

... where the information is peculiarly within the knowledge of the party; the burden shifts to him. . . .<sup>65</sup>

\* \* \* \* \*

... where, for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the

<sup>61</sup> H. Rep. 2287, 74th Cong. 2d sess., p. 2.

<sup>62</sup> 80-Cong. Rec. p. 6674.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Congressman Ekwall, 80-Cong. Rec. p. 8328.

party . . . then the burden of going forward . . . rests upon him . . .<sup>66</sup>

Such explanations could not and would not have been used if Congress had meant to apply 2(b) to the buyer. He has no "peculiar"<sup>67</sup> knowledge of the facts concerning the seller's costs nor does he have them within his control.

Moreover, if an intent to apply 2(b) to 2(f) existed there most surely would have been debate over such an unusual procedural enactment. Especially is this so since there was considerable debate regarding the procedural rule of 2(b) as applied to the seller.<sup>68</sup>

Chronological developments in the drafting of section 2(b) also confirm that it was meant to apply to sellers only. As first reported 2(b) provided for the shifting of the burden of proof only when a *prima facie* case was made "that there has been discrimination in price."<sup>69</sup> Discrimination in price is a seller offense only.

Subsequently, upon recommendation of the House Judiciary Committee, 2(b) was amended to make it applicable to another seller offense, namely, discrimination in "services or facilities furnished" under Section 2(e).<sup>70</sup>

Thus careful consideration was given to the naming of the offenses in section 2(b) to which that section would be applicable. Only two were named—both are seller offenses.

Congressman Utterback, in explaining the meaning of the due allowance proviso to the House, gave many examples of situations in which differing methods of sale and delivery might result in cost savings. It is clear from the examples that justification by the seller only was contemplated.<sup>71</sup>

<sup>66</sup> Congressman Gilechrist, 80 Cong. Rec. p. 8452. See also, Congressman Patman, 80 Cong. Rec. 8442.

<sup>67</sup> "Peculiar" means "characteristic of one only"; "singular", "belonging to an individual", or "not common". Webster's Collegiate Dictionary (5th ed.).

<sup>68</sup> 80 Cong. Rec. 8328, 8441 and 8442.

<sup>69</sup> H. Rep. 2287, 74th Cong. 2d sess. p. 2.

<sup>70</sup> 80 Cong. Rec. 8357.

<sup>71</sup> 80 Cong. Rec. 9417.

The Committee Report on the Senate bill (S. 3154), submitted by Senator Logan, discussed the "due allowance" proviso at some length. Explicit in this report is the understanding that the seller was setting two prices, that he would know why he did so, and thus be able to justify his action. It stated:

It is designed, in short, to leave the test of a permissible differential upon the question: If the more favored customer *were sold* in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually *cost the seller to do so*, his other business remaining the same? . . . (Emphasis added.)<sup>72</sup>

The House Committee Report on Bill H. R. 8442 stated:

Section (e) [2(b) as enacted] down to the proviso merely lays down directions with reference to procedure including a statement with respect to burden of proof.<sup>73</sup>

The section was characterized as an "added precautionary provision"<sup>74</sup> . . . "relating to certain questions of procedure before the Federal Trade Commission."<sup>75</sup>

The reason for the insertion of 2(b) was explained to the House by Congressman Utterbaek:

Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof, substantially as suggested above, as applicable to hearings before the Federal Trade Commission.<sup>76</sup>

<sup>72</sup> S. Rep. No. 1502, 74th Cong., 2d Sess. p. 6.

<sup>73</sup> H. Rep. 2287, 74th Cong., 2d Sess., p. 16.

<sup>74</sup> Ibid., p. 7.

<sup>75</sup> House Report 2951, 74th Cong., 2d Sess., p. 7.

<sup>76</sup> 80 Cong. Rec. 9418.

Its effect as understood by Congressional draftsmen was stated by Congressman Patman:

Now, with regard to the matter of burden of proof

Let me analyze that for you. What does that mean? It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there.<sup>77</sup>

The Congressional understanding of the "existing law" which was being "restated" in section 2(b) was explained to the House by Congressman Gilchrist:

We should distinguish between the duty of going forward with the evidence and the burden of proof. It is often wise to place the burden of producing evidence on the party best able to sustain it. It is very often held that where the party who does not have the original burden of proof, but who does possess positive and complete knowledge concerning the existence of facts which his opponent is called upon to negative; or, where, for any reason, the evidence to prove a fact is chiefly, if not entirely, within the control of the party who does not have the general or original burden of proof, then the burden of going forward with and producing this evidence rests upon him who does have the facts primarily and chiefly within his possession.<sup>78</sup>

And Congressman Ekwall, in answer to Congressman Celler's argument that 2(b) was contrary to the rule of presumption of innocence, stated:

Does not the gentleman know that the rule he has stated is not the rule in this country; that where the information is peculiarly within the knowledge of the party, then the burden shifts to him to prove that fact?<sup>79</sup>

<sup>77</sup> 80 Cong. Rec. p. 8442. Congressman Patman then illustrated the rule's application to a seller who "treated his customers unfairly".

<sup>78</sup> 80 Cong. Rec. p. 8452.

<sup>79</sup> 80 Cong. Rec. p. 8328.

From this legislative history it is clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable in proceedings before the Federal Trade Commission.<sup>80</sup> Furthermore, it is clear that the legislative intention was to apply it to sellers only. Otherwise such explanations as to the basis of the rule, i.e., "where the information is peculiarly within the knowledge of the party then the burden shifts to him" and where "the evidence to prove a fact is chiefly, if not entirely, within the control of the party . . . then the burden of going forward . . . rests upon him," would have no application. The buyer has no "peculiar" knowledge of the facts concerning the seller's cost justification nor does he have them within his control.

The affirmative expressions of members of the legislature as to the application of 2(b) to sellers only, in contrast to the omission of any reference to its application to buyers either in debate or in committee reports, enforces the inference that Congress did not contemplate its application to buyers.<sup>81</sup>

## *2. Legislative history of 2(f).*

The legislative history of 2(f) in nowise supports the view that the buyer has the burden of proving his seller's cost justification. Section 2(f) did not appear in either the Patman Bill or the Robinson Bill as reported by the respective committees.<sup>82</sup> It was offered by Senator Copeland of New York as an amendment to the Robinson Bill:

Mr. Robinson: Mr. President, as I understand—and I inquire of the Senator from New York whether my understanding is correct—he has offered the amendment in the form in which it was submitted to me yesterday evening.

Mr. Copeland: Yes, sir; I have.

<sup>80</sup> We have found absolutely nothing in the legislative history to contradict this clear Congressional purpose and understanding.

<sup>81</sup> *Ford v. U. S.*, 273 U.S. 593, 611.

<sup>82</sup> H. Rep. 2287, 74th Cong., 2d Sess. and S. Rep. No. 1502, 74th Cong., 2d Sess.

Mr. Robinson: This amendment makes the person who knowingly receives an unfair, discriminatory price also liable; and I think it is sound in principle.

The Presiding Officer: The question is on agreeing to the amendment offered by the Senator from New York to the amendment of the Committee.

The amendment to the amendment was agreed to.<sup>83</sup>

There was no further discussion of 2(f) in the Senate.

The House Bill as passed *did not* contain a provision similar to 2(f). In Conference the House Conference agreed to accept the Senate provision. The House Conference Report, with respect to 2(f), stated:

Subsection (f) makes it unlawful for any person engaged in commerce knowingly to induce or receive a discrimination in price which is prohibited by this section. This subsection was not contained in the House Bill, but is the same as subsection (f) in the Senate amendment, except that the words "or terms of sale" are eliminated to harmonize with subsection (a).<sup>84</sup>

Congressman Utterback, in his statement on the Conference Bill, stated:

The closing paragraph of the . . . amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since *it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.*<sup>85</sup> (Emphasis added.)

<sup>83</sup> 80 Cong. Rec. p. 6666.

<sup>84</sup> H. Rep. 2951, 74th Cong., 2d Sess. p. 8.

<sup>85</sup> 80 Cong. Rec. 9419.

If anyone knows whether or not a price granted is unlawful, it is the seller. Congressional Utterback's explanation to the House recognizes this fact in stating that the function of 2(f) is to enable the seller to inform the buyer that the price granted is unlawful and thus charge the buyer with equal liability.

## APPENDIX B

### Rules as to Burden of Proof as Developed by the Courts Do Not Permit Placing on Buyer the Burden of Proving Seller's Cost Justification.

One of the factors which has been relied upon by the courts as determinative of what is convenient, fair and good policy regarding the apportionment of the burden of proof has been stated by Professor Morgan, one of the leading scholars of the law of evidence, as follows:

Doubtless the compelling consideration causing the creation of some presumptions [which shift the burden of going forward with the evidence] is that the facts tending to show the existence or nonexistence of the presumed fact are peculiarly accessible to the party asserting such non-existence.<sup>86</sup>

This was the basis on which Congress rested section 2(b)<sup>87</sup> and is the basis upon which the courts have justified the placing of the burden on sellers. *Samuel H. Moss v. F. T. C.*, 148 F. 2d 378, 379; *F. T. C. v. Morton Salt*, 334 U. S. 37, 45, 60.

And, indeed, the common law is replete with examples of the application of this rule.

"Thus," says Morgan, "the establishment of the fact of delivery of a chattel in good condition by a bailor to a

<sup>86</sup> Morgan, 16 So. Cal. L. Rev. 245, 252. Determination as to burden of proof "must always remain a question of policy and fairness based on experience in different situations." *J. M. Robinson, Norton & Co. v. Tuscaloosa Mills*, 183 F. 966, 969.

<sup>87</sup> See supra pp. 63-64, 66.

bailee and the return of the chattel in a damaged condition compels the trier to assume that the damage was caused by the negligence of the bailee."<sup>88</sup>

"Familiar instances of [the above rule]," the Supreme Court has said, "are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty."<sup>89</sup>

And with reference to the rule of *res ipsa loquitur*, Dean Wigmore said that "the particular force and justice of the rule . . . consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him [defendant] but inaccessible to the injured person."<sup>90</sup>

This is the rule as to burden of proof restated in 2(b). "It [2(b)] is a restatement of existing law. . . . It is the law of this land exactly as it is written there."<sup>91</sup>

In *Casey v. United States*, 276 U. S. 413, 418, Mr. Justice Holmes said:

. . . The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Ev. sec. 2494. It is consistent with all the constitutional protections of accused men to throw on

<sup>88</sup> 16 So. Cal. L. Rev. 245, 252. This is so even though the ultimate burden of proving negligence is upon the bailor; the reason for the rule being that "the facts in that regard [as to the cause of damage] are within his [bailee's] knowledge." *Kohlsaat v. Parkersburg & Marietta Sand Co.*, 266 F. 283, 285; *Tompkins v. Bleakley Transp. Co.*, 40 F. 2d 249; 9 Wigmore on Evidence (3d ed. 1940), Sec. 2508 and authorities there cited.

<sup>89</sup> *I. S. v. Denver & Rio Grande R. Co.*, 191 U.S. 84, 92.

<sup>90</sup> 9 Wigmore on Evidence (3d ed. 1940) pp. 382-384. Illustration after illustration of application of this rule in all fields of the law could be cited. See for example, *Cleett v. Scott*, 102 F. 2d 725; *Miller v. Lykes Bros., Ripley S. S. Co.*, 98 F. 2d 185, 186; *Mammoth Oil Co. v. U. S.*, 275 U.S. 13, 51, 52.

<sup>91</sup> Congressman Patman, 80 Cong. Rec. 8442. "The real decision is made upon the judicial judgment based upon experience as to what is convenient, fair and good policy. . . ." Morgan, 11 Har. L. Rev. 906, 911.

them the burden of proving facts peculiarly within their knowledge . . . (Emphasis added).

These common law and common sense rules of fairness as to burden of proof have long been applied by the courts in the construction of statutes, even where the act makes no express provisions for such.

For example, seamen are, by federal statute,<sup>92</sup> given a right of action against a shipowner for failure to provide sufficient quantities of food or food ~~not~~ good quality. The first paragraph of the statute sets up grounds of the cause of action which "shall be shown", i.e., failure to provide sufficient food or food of good quality; the next three paragraphs set forth the specific recovery allowable; and the last paragraph is an exception in the nature of a justification which may be taken advantage of by the ship owner.

Under normal rules of statutory construction it would fall upon the seaman to establish his case by either (1) showing failure of the owner to supply sufficient provisions, or (2) "show that any such provisions" supplied were "bad in quality or unfit for use".

However, it is apparent that if the statute were given such a construction it would be meaningless since all of the evidence, excepting the personal testimony of the seaman (which would be largely opinion), is peculiarly within the knowledge and control of the owner. As stated in one of the early decisions under the statute, *The Emma F. Angell*, 217 F. 311: "The main controversy is over the fact as to whether this vessel was properly provisioned. . . . If this act is not to be enforced, except in that class of cases in which owners and masters admit dereliction of such a duty, the act might as well never have been passed." Therefore, said the court:

Some general rule must be found to afford us a compass by which to steer. That rule is that, when a controversy arises over the provisioning of a ship in accordance with the shipping articles, the *owners and masters must carry the burden of meeting the accusation by establishing the fact that the ship was properly*

<sup>92</sup> 30 Stat. 758, 764; 46 U.S.C.A. 665.

*provisioned. This burden they can easily carry. They are within the principle that the litigant who has control of the proofs must produce them.* (Emphasis added.)<sup>93</sup>

It is submitted that the sound reasoning of the above decision is applicable to this case. Indeed, the very heart of the Robinson-Patman Act will have been given life in vain and the cost justification proviso "might as well never have been passed" if the construction of the statute here urged by the Commission and the court below is adopted. The buyer is absolutely devoid of facts to show his seller's cost justification and he does not have the means to obtain them. An intent to do a vain thing shold not be imputed to the Congress.

Just as the courts in construing the seaman statute have refused to nullify the purpose and policy of the statute, so should the court in this case refuse to adopt a construction of the Robinson-Patman Act which is not only contrary to its express terms but one which would destroy the policy and purpose of the act—a construction which would break the substantive policy of the statute (i. e., that price differentials are legal where cost justified) upon a procedural impasse.

The opinion of the Commission in the instant case states that petitioner "made no attempt to show that the price differentials and discriminations induced and received by it

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<sup>93</sup> The courts have uniformly followed this rule. *The Silver Shell*, 255 F. 340, 341; *Miller v. Lykes Bros.-Ripley S. S. Co.* 98 F. 2d 185, 186.

*E. S. v. Denver & Rio Grande Railroad Co.*, 191 U.S. 84, presented a case wherein, by an Act of Congress, defendant railroad was granted "the right of way over the public domain . . . and the right to take from the public lands adjacent thereto, . . . timber . . . for the construction and repair of its railway and telegraphic line". Defendant cut certain timber from public lands. The United States brought an action of trover alleging that defendant had "converted" the timber. No testimony was offered by either party to show whether the timber cut from the lands by defendant was "required for the construction and repair of its railway and telegraph line" as provided by the statute. On the question of burden of proof, the court held that since "the means of proof as to the purpose for which the timber was cut were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it".

made only due allowance for differences in the cost of manufacture, sale or delivery. . . ." The inference is that since petitioner failed to produce such evidence, the evidence was harmful to it.

This question has been dealt with in detail by the Supreme Court in *Mammoth Oil Co. v. United States*, 275 U. S. 13, 51, 52. In that case the court considered the resultant implications to be drawn in two distinct situations: first, where a defendant with evidence available to him fails to produce it and, secondly, where a defendant fails to produce evidence because of the impossibility of production through no fault of his own.

The court stated that the failure to produce evidence in the first situation "stands on a different basis," than failure in the second situation, and laid down several rules in precise terms.

First, quoting Lord Mansfield: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was *in the power of one side to have produced, and in the power of the other to have contradicted.*" (Emphasis added.)<sup>24</sup>

Secondly, where "it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge."

But, thirdly, this "natural conclusion" that the unproduced evidence "would tend to sustain the charge" is to be cautiously applied, and only in cases where it is manifest that proofs are *in the power of the accused, not accessible to the prosecution.*" (Emphasis added.)<sup>25</sup>

We submit that these simple rules of fair procedure as developed by the courts and restated by Congress in Sec-

<sup>24</sup> See also *Kirby v. Tallmadge*, 160 U.S. 379, 383.

<sup>25</sup> Quoted by the Court from the opinion of Chief Justice Shaw "in the celebrated case of *Com. v. Webster*, 5 Cushing, 295, 316, 52 Am. Dec. 711."

tion 2(b) govern this case and require this Court to reject the interpretation of the Court of Appeals.

The proof with reference to the sellers' cost justification is not within "the power" of petitioner to produce.

## APPENDIX C

Excerpts from "Accounting as an Aid to Compliance with the Robinson-Patman Act" by William Edgar Thomas, Jr., Urbana, Illinois, 1944,<sup>96</sup> showing the difficulties involved, even in the case of a seller, in preparing cost studies under the Robinson-Patman Act.

Pages 6-8:

Specifically the law provides, "that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such persons sold or delivered." It is about this justification that the thesis is written primarily; it is to indicate the possibilities of accounting as an aid to management in the establishment of the maximum allowable price differential for a customer under this section of the law.

The accountant who has been assigned the task of analyzing distribution costs for the purpose of supporting price differentials already given or to prepare a discount schedule will find that much of the work done in making analyses for management is unsuitable, and that analysis must be carried farther than is generally done for management. In general, the analyses made for management are for the purpose of aiding in the determination of what to sell, where to sell, how to sell, and to whom to sell, and in the elimination of non-productive costs. Thus, managerial analyses are

<sup>96</sup> An abstract of a Thesis submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy in Accountancy in the Graduate School of the University of Illinois, 1942.

generally analyses by products, by territories, by channels of distribution, and by customers. The analysis for the determination of legitimate price differentials must be to discover the difference in the cost of manufacturing, sale, and delivery of goods of like grade and quality to competing customers. It must demonstrate the cost of distributing a unit of product to each of two customers in the same competitive area, and, thus, must be carried one step farther than either the managerial analysis for products or the managerial analysis for customers. Further, a different approach may be used for the two analyses. If management is confronted with the problem of whether to add a product, a territory, or class of customers, an analysis on the basis of differential or marginal costs will be invaluable. An analysis based on the marginal or differential cost approach would be entirely unsuitable for the purpose of justifying price differentials because of the apparent intention of the framers of the Act not to allow marginal costs as a basis for justification for price differentials.

The accountant who must establish legal price differentials has a difficult task. While the law states that the justification rests upon differences in cost, there is no precise definition of the costs which may or may not be included in the computations. The accountant will find little help in a study of the few cases which have been settled or in a study of the Congressional Record. A positive statement is made in the H. C. Brill case by the Commission in explaining that the cost of selling, credit, ordering, shipping, advertising, and other elements can be considered as producing a differential in cost. A definition of the functions mentioned is not made, and "other elements" is, of course, rather vague. In any case, the accountant will include or exclude the cost on the basis of his ability to demonstrate a causal relationship between the cost and the allocation unit which is the product-customer. At one extreme are costs which unquestionably may be included because they can be traced definitely to the product sold to the customer. An example would be

freight out. At the other extreme are costs which will probably be excluded in most cases because of the difficulty or impossibility of expressing and proving even an indirect relationship between the cost and the unit of the product-customer. Examples of this type are the cost of public relations work, and the directors' fees. While the accountant should be in a position to prove that a relationship does exist between the cost and the product-customer, the measurement of the relationship does not have to be specific and precise, but may be accepted by the Federal Trade Commission if it is reasonable.

The justification for price differentials may be found in manufacturing costs or distribution costs. It is generally agreed by commentators that there can be no difference in cost which will justify a price differential if manufacturing is for stock.

#### Pages 8-12:

In analyzing distribution costs to discover cost differences for the justification of price differentials, the first step for the accountant is to define the functions and sub-functions of the distributive activities of the company. The second step is to find the cost of carrying out each sub-function. This cost is the total of the portions of the primary costs which apply to the sub-function, and while they vary from sub-function to sub-function, they may include such items as wages and salaries, supplies, heat, light, insurance, taxes, depreciation, and maintenance. If the study is being made to substantiate price differentials already given, the costs used should be those incurred in the period in which the price differentials were given, but if the analysis is to be used for the construction of a discount schedule, the costs used should be those budgeted for the period in which the schedules are to be used. When the sub-function cost has been ascertained, the next step is to allocate that cost to the allocation unit, which is the product-customer. The basis chosen should be an expression of the causal relationship between the sub-

function cost and the allocation unit, and should, in all cases possible, be an objective measurement.

On a subject as complex as distribution, it is impossible to consider all possible cases which may require modifications of general statements. With this in mind, a list of distribution sub-functions are given (see chart, pages 16-22) with their bases of allocation to the allocation unit. The sub-function is listed first, next, the order of the allocation (that is, whether the cost is allocated first to the customer and then to the product, or first to the product and then to the customer), then the basis for making the first allocation, and finally the basis for making the second allocation.

The bases in the chart are familiar to the reader or are self-explanatory, except one. The basis is expressed as the proportionate mileage or the relative distance to each customer, and is used for the portions of salesmen's traveling costs and delivery costs, which vary with the factor of mileage. Since these costs are incurred in proportion to the mileage to be traveled to reach customers it is thought that mileage is the best basis for an allocation. If a terminal is used, for example, a warehouse for deliveries or a sales office for salesmen, the amount of mileage cost to cover his circuit which is to be allocated to a customer is the percentage of the distance which that customer is from the terminal of the total distance of all customers on that circuit from the terminal. The distance to each customer should be taken as the shortest practicable route for the salesman or delivery truck from the terminal to the customer. If the salesman does not operate from a terminal, a possible solution is to establish a base point for the measurement of distances. The base point should be established by plotting all customers on a map and averaging their distances from an X axis and from a Y axis.

Work to be done by the accountant in connection with the Robinson-Patman Act may be either an attempt to justify price differentials which have already been given by the company or to aid in the construction of price schedules so that no unjustifiable price differ-

tials will be given. If he is charged with the former he will carry out the steps outlined above, allocating the costs incurred in the period in which the alleged discrimination took place to the customers involved and to the products which they purchased. Of course, only the costs of the sub-functions which are used in serving the customer should be allocated to him. When the total cost of selling a product to a customer has been determined it can be reduced to a unit cost so the unit costs of the customers involved in the alleged discrimination can be compared.

A more positive approach is to establish price schedules which are legal, so there will be no possibility of a violation of the Robinson-Patman Act. The price schedules which the accountant may aid in constructing are the straight quantity discount, the cumulative discount, and the trade or functional discount. In addition to the preparation of discount schedules for use by various classes of customers, the accountant may be asked to determine the amount of the justifiable price discrimination for goods sold to one specific customer.

The accountant in building up a straight quantity discount schedule should go through the following steps: (1) a critical survey of all manufacturing and distribution costs, (2) the determination of costs which may be considered costs of manufacturing, selling, and delivery within the meaning of the Robinson-Patman Act, (3) the determination of the proper basis (if one can be found) for allocating each cost to the allocation unit which is the customer-product, (4) a classification of customers, i.e., a definition of the class of customer which is to use the discount schedule, (5) the determination of the costs listed in number 2 which may be included in the scheduled computation when the class of customer is considered, (6) the allocation of the costs chosen in step number 5 to a cost for each order, then the study of the variations of each cost with variations in the quantity of goods ordered and delivered, (7) the fixing of the brackets at points of break in the total cost curve for increasing quantities of goods ordered and delivered, (8) the conversion of

the cost differences between brackets to a percentage of the base selling price because price schedules are customarily set up as percentages of a list price.

Steps one, two, and three require no comment here beyond what has already been mentioned in this summary. The fourth step is to define the type or class of customer to use the schedule. This must be done in a precise manner, for the inclusion of many of the costs in the computation of the cost differential depends upon the type of customer, the way in which he orders, the method in which goods are delivered to him, the way in which he pays for the goods, and, in general, the relationship between the customer and the vendor. The fifth step is to survey the costs listed in step number two and eliminate all which do not meet a requirement. That requirement is that the cost must not be allocable to the customer-product on the basis of a customer characteristic, except such customer characteristics which are *uniform* for all customers who are to use the discount schedule. Examples of the characteristics of a customer are his distance from the warehouse, his habit of ordering by mail or through a salesman, and his habit of paying cash or buying on account. To include costs which are not constant for each customer for each quantity would mean that they would have to be included as an average. The resulting price schedule would then reflect the differences in the cost of selling different quantities to *average* customers. Discrimination is between *real* customers and the test of differentials may be made on the basis of the cost to sell to *real* customers. If the real customers vary in any way from the average which was the basis for their price differentials, the test will show unjustified price differentials. A uniformity of customer characteristics will eliminate this possibility.

The sixth step is to study the action of the cost for an order when the quantity of the order fluctuates. A separate study of this type should be made for each sub-function cost which is to be included in the computation of price differentials for the particular schedule being prepared. The sub-function cost curves for vary-

ing quantities should then be combined to find the total cost curve for varying quantities of goods.

The seventh step is to break the cost curve into segments to establish quantity brackets. The points at which division should be made are the points of significant change in the cost curve for each sub-function. If the cost curve is a smooth one the division will have to be an arbitrary one. Then the points established for all of the curves should be summarized to give the points on the total curve. If many breaks occur close together they probably should be combined in order to reduce the number of brackets. The adjustment will be made on the basis of the relative significance of the two costs giving rise to the breaks. If a pattern of the volume of orders has been established, the brackets should be set so that the greatest volume of orders for that approximate quantity will be centered in the bracket. In addition, the brackets should not be so large as to include unlike types of business such as "nuisance business" and regular orders from small dealers, or to make very important discrimination for each unit between the purchaser of the greater number of units in one bracket and the purchaser of the smallest number of units in the next larger bracket, nor should the brackets be so small as to, in effect, make the discount available to one or a few customers only.

The final step in the construction of the quantity discount schedule is to find the percentages for the brackets of the schedule. The units of goods sold in the lowest bracket will be at list price. The discount for each bracket can be found by dividing the difference between the average unit cost in that bracket and the average unit cost in the lowest bracket by the list price.

Pages 12-13:

A most important part of the preparation of the functional discount schedule is the classification of customers. The old classification of customers as manufacturer, wholesaler, retailer, and consumer is no longer

satisfactory because of the growing complexity of the system of distribution. The discount schedules are to be based upon cost differences which, in turn, vary with functions performed for customers. Therefore, the classification of customers must be based upon the functions which are performed for those customers. The functions performed for any group of customers using one discount schedule should be homogeneous, at least so far as costs included in the schedule computation are concerned.

The general rules for the preparation of straight discount schedules must also be followed in preparing a functional quantity discount schedule. Each functional discount schedule must reflect cost differences arising from the assumption of functions by the class of customers using that schedule. Not only should there be a cost relationship between the various quantity brackets on the schedule, but there must in addition be a definite cost relationship between the schedules used by the various classes of customers. Thus, the difference in price to any one customer must be accounted for by differences in cost arising either from differences in quantity of goods sold to the customer or from the cost of functions assumed by the purchaser. In the general preparation of discount schedules, all costs which might be legitimately included as supporting a cost difference are studied critically, and the changes in the cost of an order resulting from changing quantities ordered are studied and set up in tables or graphs. This procedure is followed for each sub-functional-cost. To find the justifiable price differential between classes of customers it is necessary to combine the tables of cost of the sub-functions which the one class assumes as compared with the other. A comparison of the two tables will show the justifiable discrimination between the two classes for any quantity of goods. The discounts within each schedule should be determined solely on the basis of differences in cost resulting from differences in the quantity of goods sold on each order.

### ALLOCATION OF COSTS FOR THE JUSTIFICATION OF PRICE DIFFERENTIALS

*(See page 9 for explanation of chart.)*

#### *Expenses*

1. Sales traveling costs (which vary with mileage).
2. Sales traveling costs (which vary with time).
3. Salesman's salary:
  - (a) Salary relating to time to reach customers.
  - (b) Salary for time spent interviewing customer.
4. Sales commissions and bonus:
  - (a) Time spent in traveling.
  - (b) Time spent in selling.
5. Salesman's living expenses:
  - (a) Living expenses multiplied by stop time, divided by total working time.
  - (b) Living expenses multiplied by travel time, divided by total working time.

#### *Order of Allocation*

Customer-product.

Customer-product.

Customer-product.  
Customer-product.

Customer-product.  
Customer-product.

Customer-product.

Customer-product.

#### *Basis of First Allocation*

Proportionate mileage on circuit.

(a) Time on road—proportionate time required to reach each customer.  
(b) Time at stop direct to customer.

Proportionate time required to reach each customer.  
Direct to customer.

Proportionate time required to reach each customer.  
Direct to customer.

Direct to customer.

Relative distance to customer.

#### *Basis of Second Allocation*

All salesman solicitation cost already allocated to customer may be allocated to products: (1) order taking time—basis of number of lines; (2) promotion—basis of total possible sales to the customer (based on merchandise sold by customer).

Same as 1, above.

| <i>Expenses</i>  | <i>Order of Allocation</i> | <i>Basis of First Allocation</i>   | <i>Basis of Second Allocation</i>  |
|--|----------------------------|--|--|
| 6. Salesman's supervision:<br>Allocated to each salesman on basis of unit costs for checking reports, sending out form letters, and other routine work. Time reports for other types of supervision. |                            |  |  |
| Then allocate to:<br>Those supervision costs facilitating travel, e.g., routing.<br>Supervision costs aiding salesman's presentation e.g., cost of sales manual.                                     | Customer-product.          | Relative distance to each customer.  | Same as 1, above.  |
| 7. Telephone costs incurred by salesmen in the field.  | Customer-product.          | Time spent interviewing customers.   | Same as 1, above.  |
| 8. Telephone solicitation from sales office.   | Customer-product.          | Direct to customer.  | Direct to the product, if possible. If a service call or a catalog, allocation on the basis of the total possible sales to the customer (based on merchandise sold by the customer). Same as 7, above. |
| 9. Taking orders by telephone.   | Customer-product.          | Functional unit cost plus toll charges direct to customer.   | Same as 7, above.  |
| 10. Solicitation by mail, pamphlets, price lists, catalogs, etc.   | Customer-product.          | Functional unit cost direct to customer plus toll charges direct to customer.                        | Same as 7, above.  |
| 11. Delivery by rail.  | Customer-product.          | Cost per piece (which may vary with the type of piece mailed) plus mailing costs—direct to customer. | Direct.  |
| 12. Delivery by common carrier (truck).  | Customer-product.          | Direct, on basis of published tariffs.   | Direct.  |
|  |                            | Direct, on basis of charges or published tariffs.  |  |

| <i>Expenses</i>  | <i>Order of Allocation</i> | <i>Basis of First Allocation</i>   | <i>Basis of Second Allocation</i>  |
|--|----------------------------|--|--|
| 13. Delivery by company owned trucks (including all costs):<br>(a) Mileage costs.  | Customer-product.          | Basis of relative distance to reach each customer from distribution point.                                   | (1) Weight or bulk, or<br>(2) do not allocate.   |
| (b) Time costs:<br>(1) Travel time.  | Customer-product.          | Relative time required to reach each customer from distribution point.                                       | (1) Weight or bulk, or<br>(2) do not allocate  |
| (2) Stop or unload time.   | Customer-product.          | Direct to customer.  |  |
| (c) Load cost.   | Customer-product.          | Relative ton-miles of goods delivered to each customer on the route as computed from the distribution point. | Standard handling unit, per case, per pound, depending upon type of merchandise unloaded.<br>Relative weight of the products delivered to the customer.  |
| 14. Mailing department costs: a service department, and its costs are allocated to other functions.  |                            |  |  |
| 15. Invoice cost (standard costs developed for each operation below):<br>Arranging material for typing.<br>Inserting invoices.<br>Typing heading and shipping instructions.<br>Typing one line and extending.<br>Proof of extension and total.<br>Proof of weight and total.<br>Removing invoices.<br>Assembling orders.<br>Marking production report. |                            | Not included in analysis.<br>Not included in analysis.<br>Not included in analysis.                          | Standard cost direct to customer-product.<br>Standard cost direct to customer-product.<br>Standard cost direct to customer-product.<br>Not included in analysis.<br>Not included in analysis.<br>Not included in analysis. |

| <i>Expenses</i>   | <i>Order of Allocation</i> | <i>Basis of First Allocation</i>                       | <i>Basis of Second Allocation</i>  |
|---|----------------------------|--|--|
| 16. Accounts receivable (itemized):<br>Actual or standard unit costs<br>are found for each of the fol-<br>lowing: |                            |  |  |
| Sorting (orders, etc.).   | Customer-<br>product.      | The order or voucher sorted.                           | Per item sorted.   |
| Predetermined total.  | Customer-<br>product.      | The posting media.                                     | Per item of goods added and listed.  |
| "Stuffing" ledger.  | Customer-<br>product.      | The number of times the account<br>has been posted.    | Not allocated because it is a joint<br>cost, or sales value.               |
| Posting.  | Customer-<br>product.      | The posting.   | Per item for goods posted (posting of<br>purchase returns and allowances). |
| Checking predetermined<br>totals.   | Not allo-<br>cated         | .....  | .....  |
| 17. Accounts receivable (not<br>itemized).  |                            |  |  |
| Sorting posting media.  | Customer-<br>product.      | Item of posting media sorted.                          | Item of posting media sorted.  |
| Predetermined total.  | Customer-<br>product.      | Item of posting media listed.                          | Item of posting media relating to the<br>product listed.                   |
| "Stuffing" ledger.  | Customer-<br>product.      | The number of times the account<br>has been "stuffed." | Not allocated, or sales value.   |
| Posting.  | Customer-<br>product.      | The posting.   | (A joint cost of all goods). Not allo-<br>cated, or sales value.           |
| Checking predetermined total.   | Not allo-<br>cated.        | .....  | .....  |

| <i>Expenses</i>   | <i>Order of Allocation</i>  | <i>Basis of First Allocation</i>  | <i>Basis of Second Allocation</i>   |
|---|---|---|---|
| 18. Monthly statements:<br>Allocation same as for accounts receivable.<br>Cost of mailing the statement.  | Customer-product.   | Functional cost to mail a letter and number of letters mailed to customer.  | Sales value, or omit.   |
| 19. Collection costs routine:<br>(a) Receiving, opening, and sorting remittances.<br>(b) Listing remittances.<br>(c) Preparation of cash vouchers to be used for posting.<br>(d) Verification of remittances.   | Customer-product.<br>Customer-product.<br>Customer-product.<br>Customer-product.                      | Mailing room unit costs for operations performed for the customer.<br>The number of remittances.<br>The number of remittances.<br>The number of remittances.  | Sales value.<br>Sales value.<br>Sales value.<br>Sales value.  |
| 20. Collection costs, special attention:<br>(a) Checking accounts receivable for past due accounts.<br>(b) Preparation of form letters and maintenance of files.<br>(c) Mailing of form letters to customers at regular intervals.<br>(d) Dictation and typing of special letters.<br>(e) Collectors' services. | Customer-product.<br>Customer-product.<br>Customer-product.<br>Customer-product.<br>Customer-product. | The accounts checked.<br>The letter mailed.<br>Mailing room unit costs for operations performed for the customer.<br>Dictation and typing unit costs for operations performed for the customer.<br>Direct charge on time. | Sales value.<br>Sales value.<br>Sales value.<br>Sales value.<br>Sales value.  |
| 21. C.O.D. costs.   | Customer-product.   | Direct.   | Direct (use schedule of charges, assuming that each product was shipped separately), or omit from analysis.<br>Sales value. |
| 22. Bad debts expense.  | Customer-product.   | Credit rating.  |   |
| 23. Dictation and typing:<br>(a) Dictation.<br>(b) Typing.  | Customer-product.<br>Customer-product.  | Rate for grade of dictation X amount for the customer.<br>Rate for grade of typing X amount for the customer.   | Amount relating to the product.<br>Amount relating to the product.  |

| <i>Expenses</i>  | <i>Order of Allocation</i>             | <i>Basis of First Allocation</i>   | <i>Basis of Second Allocation</i> |
|--|--|--|-----------------------------------|
| 24. Storage costs (goods carried in stock):<br>(a) Labor and equipment cost of placing goods in storage.<br>(b) Storage-occupancy costs.   | Product-customer.<br>Product-customer. | Direct, on time, or standard handling unit basis.<br>Space occupied and length of time in storage. Length of time is a seasonal average. | Direct, on unit basis.<br>Direct. |
| 25. Storage costs of goods produced on special order.  |  | Direct to customer-product, on basis of actual space and length of time in storage.  |                                   |
| 26. Order filling:<br>(a) Clerical:<br>(1) Receipt of order.<br>(2) Approval of credit.<br>(3) Preparation of routine forms to be used in the packing department, shipping room, follow-up file, etc.<br>(4) Credit to the stock records.<br>(5) Pricing of records.<br>(6) Invoice preparations.<br>(7) Posting to accounts receivable. |  | Discussed elsewhere.<br>Discussed elsewhere.<br>Discussed elsewhere.   |                                   |
|  |  | Direct to customer-product on basis of invoice item.   |                                   |
|  |  | Direct to customer-product on basis of invoice item.   |                                   |
|  |  | Discussed elsewhere.   |                                   |
|  |  | Discussed elsewhere.   |                                   |
| (b) Order assembly. Time studies set standard costs for obtaining quantities of goods from stock:<br>(1) Counting and handling units.<br>(2) Trips from bin to assembly point.   |  | Direct to customer-product by use of standard costs.   |                                   |
| (c) Packing standards to be set for packing various quantities of product for shipments by various methods.  |  | Direct to customer-product by use of standard costs.   |                                   |
|  |  | Direct to customer-product by use of standard costs.   |                                   |

**Expenses**

27. Manufacturing cost:

- (a) If manufacturing for stock.
- (b) If manufacturing on special order:

(1) Material:

Materials if purchased definitely for the order.  
Receiving and purchasing department costs.

(2) Labor:

Overtime:

If during rush season.  
If a rush job results in working overtime to get back on schedule.

Set-up costs.

(3) Overhead.

*Order of Allocation*

*Basis of First Allocation*

*Basis of Second Allocation*

Do not allocate.

Direct to customer-product.

Direct to customer-product on basis of sub-functional unit costs multiplied by number of units performed for the customer.

Allocate to all jobs on basis of labor hours.

Allocate entire overtime to the rush job.

Allocate entirely and directly to the job.

Do not allocate.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1952.

**No. 89**

AUTOMATIC CANTEEN COMPANY OF AMERICA,

*Petitioner,*

vs.

FEDERAL TRADE COMMISSION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION OF AUTOMATIC CANTEEN COMPANY  
OF AMERICA, PETITIONER, TO THE MOTION OF  
NATIONAL CANDY WHOLESALERS ASSOCIA-  
TION, INC., FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE.

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## OBJECTION OF AUTOMATIC CANTEEN COMPANY OF AMERICA, PETITIONER, TO THE MOTION OF NATIONAL CANDY WHOLESALERS ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Conformably to Rule 27-9(e) of the Court, Automatic Canteen Company of America, Petitioner herein, objects to the motion of National Candy Wholesalers Association, Inc., for leave to file a brief as *amicus curiae* and respectfully submits as a compelling reason for withholding consent, that the movant has not brought itself within the requirement of said Rule 27-9(e) in that the movant has not set forth facts or questions of law that have not been, or rea-

sions for believing that they will not adequately be presented by the parties, or their relevancy to the disposition of the case.

Thus, as sole justification for appearing as *amicus curiae*, movant points to the case of *Burnet v. Houston* (1931), 283 U. S. 223, 51 S. Ct. 413. That was a case involving the burden upon a taxpayer of income tax to support deductions claimed by the taxpayer. Plainly, facts supporting such deductions were wholly within the control of the taxpayer. It is pointed out in the brief of Petitioner, objector here (see pages 44 and 45, and also pages 52 and 53 of that brief), as one of the reasons why Section 2(b) of the Robinson-Patman Act cannot apply to proceedings under Section 2(f) of that Act; that to apply it would be placing upon Petitioner the burden of producing facts which were not and are not within the control of the Petitioner. The case of *Burnet v. Houston* (283 U. S. 223, 51 S. Ct. 413), is not at all relevant to that issue and there is no other issue anywhere in this cause to which that case could be said to be relevant in any possible way. Movant's motion, therefore, fails to supply an essential element required by said Rule of this Court as a condition to consideration by this Court of its motion for leave to intervene as *amicus curiae*.

The sole issue in the cause relative to which movant could possibly intend to cite said case of *Burnet v. Houston* (283 U. S. 223, 51 S. Ct. 413) (as to which, as shown, that case is not at all relevant), has in fact been fully presented in the brief for Petitioner at pages 44 and 45, and pages 52 and 53 of that brief. Movant's motion, therefore, fails to comply with said Rule 27-9(c) for the further reason that it does not show reasons for believing that the point will not be adequately presented by the parties, for it thereby appears that it has in fact already been fully presented.

Petitioner respectfully submits to the Court that it is unthinkable that the attorneys for the Government will not

respond fully to the portions of Petitioner's brief (pages 44 and 45, and 52 and 53). And it is quite unnecessary and a useless accumulation of briefs to permit repetition by an *amicus curiae*.

Respectfully submitted,

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No. 89

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AUTOMATIC CANTEEN COMPANY OF AMERICA,  
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FEDERAL TRADE COMMISSION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

REPLY BRIEF FOR PETITIONER

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## CITATIONS

### Cases:

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### Miscellaneous:

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| 80 Cong. Rec. 9419  | 5, 8 |
| F.T.C. Case Studies in Distribution Cost Accounting (1941), H. Doc. 287, 77th Cong. 1st Sess. | 10   |
| Freer, Accounting Problems Under The Robinson-Patman Act, 65 J. Accountancy 480               | 11   |
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| H. Rep. 2951, 74th Cong. 2d Sess.   | 5    |
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REPLY BRIEF FOR PETITIONER

---

Respondent's principal argument is that section 2(f) of the Robinson-Patman Act means something entirely different from what it says. First, it changes the words "prohibited by this section" to mean "prohibited by the main-enacting clause of section 2(a)", then it deletes the word "receive", and finally it adds some provisos.

Thus, for the purpose of this case, the Federal Trade Commission has rewritten section 2(f) to read as follows (the "legislative" legerdemain is indicated by deletions and italics):

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce ~~or receive~~ a discrimination in price which is prohibited by ~~this section~~ *the main enacting clause of section 2(a)*: *Provided, That nothing con-*

tained herein shall prevent a buyer from justifying such differentials by showing that they make only due allowance for the seller's differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such persons sold or delivered: . . .

## I

The word "receive" is deleted by respondent in the following language: ". . . the buyer would not be responsible for prices which he receives in the ordinary course of business . . . even though some of those prices may actually be unlawful discriminations unless such discriminatory prices were the result of his own activities. . . . It follows, therefore, that the buyer needs to concern himself only with those lower prices in the granting of which he plays a significant part" (Comm. Br. p. 23).

The issue in this case is whether the buyer has "precisely the same burden of proving cost justification" as the seller, once it is shown that the buyer knowingly received a price differential (Opinion below, R. 522). For nearly ten years the Commission has so contended *in this case*.

Now the Commission abruptly modifies its position in presenting its case to this Court. It now advances for the first time, a new and novel theory. A buyer, says the Commission, may knowingly receive "unlawful discriminations" without violating 2(f), unless such discriminatory prices were the result of affirmative action on his part (Comm. Br. pp. 23, 25, 52).

The Commission's position is that mere affirmative solicitation of lower prices by the buyer constitutes the required "affirmative action" which shifts to the buyer the burden of proving his sellers' cost justifications (Comm. Br. p. 23).

In other words, *the buyer must not ask the seller for a lower price.*

With respect to this new position of the Commission, we invite the Court's attention to the following points:

1. Since the act specifically permits differentials in price and since the basic philosophy of the act is to encourage such differentials where economically justified,<sup>1</sup> logic compels the conclusion that Congress contemplated that such differentials would be granted as a result of the normal bargaining process. Sellers do not, out of the goodness of their hearts and without solicitation, grant lower prices just because they may lawfully do so.

2. The commission's new position, *i. e.*, that petitioner could have received lower prices without being put to the impossible burden of proving its sellers' cost justifications *if it had not asked for them*, constitutes an unequivocal admission that affirmance by this Court of the lower court's decision will destroy bargaining between buyers and sellers. For how can there be normal bargaining if buyers cannot ask for a lower price?

3. The commission now "ascribes to the word 'knowingly' the connotation of discriminatory prices resulting from special solicitation, negotiation, or other arrangement," *i. e.*, bargaining (Comm. Br., p. 52). But the decision of the court below is based upon no such novel connotation. It squarely holds that the act "places precisely the same burden of proving cost justification upon the buyer" as the

<sup>1</sup> The legislative history and the act itself disclose two complementary purposes: (1) Prohibition of price discrimination and (2) affirmative sanction of economically justified price differentials. The latter purpose as reflected in the cost justification proviso, was considered by Congress "of the greatest importance" and it was the firm intention of Congress that such differentials were not to be "in the remotest degree disturbed by this bill . . ." S. Rep. 1502, 74 Cong. 2d Sess. p. 5 and H. Rep. 2287, 74 Cong. 2d Sess. p. 17. See Pet. Br. p. 23.

seller. The lower court did not hold that this burden falls on the buyer *because he asked* for the lower price.

The Commission by now attempting to make the ultimate issue of buyer liability turn on the additional issue of solicitation gives the superficial impression that it is taking a more lenient position. But, the result is that it is attempting to make the fact of bargaining an indispensable element of violation. Thus, the Commission admits that the right to bargain over prices is the basic issue. However, no amount of repetition that petitioner asked for lower prices (based on cost savings) can cloud the fact that the narrow issue of statutory construction is whether the buyer must prove his sellers' cost justifications, whether he asked for or merely received lower prices.

Our position is that the significance to be attached to the fact that petitioner asked for lower prices based on cost savings is that it was attempting to adhere to the purpose and intent of the Robinson Patman Act.

4. The Commission purports to derive its new meaning for the word "knowingly" from a statement in the House Report with reference to the meaning of the word "knowingly" as used in Section 2(a) of the act. The meaning of the word in 2(a) cannot be equated to its meaning in 2(f).

Section 2(a) prevents price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . ." (Emphasis added.)

It will be noted that the word "knowingly" appears in the competitive effect clause of Section 2(a) dealing with injury to individual competitors. The House Report relied on by the Commission states that the purpose [for inserting the word knowingly] is to exempt from the meaning of the surrounding clause those who incidently receive dis-

discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement."<sup>2</sup>

This is grounded on the proposition that if a buyer does not know he is receiving a lower price than his competitor there is probably no competitive injury. Thus the word "knowingly" as used in 2(a) has a simple and easily ascertained meaning. On the other hand, "knowingly" as used in 2(f) qualifies the entire prohibition of that section and the question as to what is prohibited by Section 2(f) is the precise issue in this case. Once that question is determined the meaning of the word "knowingly" raises no problem. Therefore, what must be sought is enlightenment as to the precise prohibition of 2(f) and it cannot be found by reference to the meaning of the word "knowingly" in the competitive effect clause of 2(a). It is, however, found in the Congressional understanding of the meaning of "knowingly" as used in 2(f), the section of the act here involved.

Congressman Utterbach, in his statement on the Conference Bill said:

The closing paragraph of the . . . amendment . . . makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from the mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers. (Emphasis added).<sup>3</sup>

<sup>2</sup> H. Rep. 2951, 73d Cong., 2d sess. pp. 5-6.

<sup>3</sup> 80 Cong. Rec. 9419.

Here we have a precise definition of the prohibition of the section at issue. It follows that no definition of the word "knowingly" as used in another section of the act can be given any weight as compared to the statement of the floor sponsor with respect to the specific section of the act to be construed.

## II

Respondent's interpretation of the words "prohibited by this section" to mean "prohibited by the main enacting clause of section 2(a)", and respondent's addition of the provisos, pervade its entire argument. One illustration is as follows: ". . . Section 2(a) prohibits in general terms price discriminations which are likely to injure competition, and that while justification is permitted under the provisos of section 2(a), it is only an exception to the general prohibition . . . . Inasmuch as section 2(a) is the only part of section 2 which prohibits discriminations in price, it is clear that 'prohibited by this section' in Section 2(f) necessarily refers to discriminations prohibited by Section 2(a). A *prima facie* case of violation of section 2(f), therefore, consists of a showing of the same elements which make a discrimination in price violative of Sec. 2(a) . . . ." (Comm. Br. p. 20; see also pp. 35, 36).

Petitioner's position is that the words "prohibited by this section" mean exactly that, namely, prohibited by the four corollars of section 2(a) and not merely the enacting clause. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than due allowance for savings in cost, for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

Petitioner does not, as respondent suggests, indulge in differing definitions of similar statutory words. Our position simply is that there are no provisos in 2(f), and, therefore, the buyer does not have the burden of justifying

the receipt of a price difference by bringing himself within such non-existent provisos.

### III

Two further arguments of respondent require comment. They would bring a wry smile to the face of one familiar with the administration and enforcement of the Robinson-Patman Act if they were not so fatal to our competitive system.

Respondent suggests that it should not be too difficult for a buyer to produce evidence of its sellers' costs (Comm. Br. pp. 41-43, 44-47). If one fact is notorious, above all others, with reference to the Commission's administration of the "due allowance" proviso, it is that the Commission has rejected the vast majority of the good-faith cost justifications that have been presented by sellers; only in the rarest of instances have sellers been able to meet the rigid cost accounting requirements laid down by the Commission.

Respondent refers on page 46 of its brief to a cost study presented by Minneapolis Honeywell-Regulator Company, a seller. This was the most elaborate, precise, detailed and expensive cost study ever presented in a Robinson-Patman case, and yet it dealt with only a portion of the discounts involved. In accepting this study the Commission admitted that the seller's "burden under the act is very great" (44 F.T.C. 351, 354). Now it reverses its field and suggests that it would *not* be difficult for a buyer, who has no access to the evidence, to do the same thing for a representative group of sellers.

Petitioner argues that where a buyer asks for lower prices based on cost savings that it necessarily follows that the buyer will be informed "of the seller's position on costs" and therefore if negotiations are honest "buyers do not stand in the position petitioner claims" (Comm. Br. p. 43).

This line of argument is patently unsound. It is absurd to assume that when a buyer, in the bargaining process, tells

the seller that he thinks he should have a lower price based on cost savings, the seller will immediately give him a cost analysis.

A buyer such as petitioner does not and, of course, cannot know how large a differential his seller can cost justify. He may know—as did petitioner herein—that he is entitled to a lower price in some amount. Therefore, he may estimate it in bargaining with his sellers, as petitioner did in this case. And when his seller gives him a lower price, whether on the basis of such estimated savings or not, the buyer has the right to assume, *in the absence of being informed to the contrary*, that the price given is lawful.<sup>4</sup>

The law does not require petitioner to examine its sellers' books or look for something to cast a suspicion on the legality of the price differential granted. *U. S. v. Detroit Timber & Lumber Co.*, 200 U. S., 324.

"There is a presumption that business is conducted lawfully . . . and that all things are rightly done . . . ; and where the act of a party may be referred indifferently to one of two motives, the law prefers to refer it to that which is honest, rather than to that which is dishonest . . ." *Fidelity & Deposit Co. v. Grand National Bank of St. Louis*, 69 F. 2d 177, 183; *Alexander v. Fidelity Trust Co.*, 249 F. 1, 11; *Boone County National Bank v. Latimer*, 67 F. 27, 30.<sup>5</sup>

A second Commission argument purporting to demonstrate the possibility of petitioner's presenting its sellers' cost justifications is the advancement of an astounding

<sup>4</sup> This is in accord with the Congressional understanding as stated by Congressman Utterback. Section 2(f), he said, ". . . affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. . . . it enables him to charge them [buyers] with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 Cong. Rec. p. 9419 (Emphasis supplied).

<sup>5</sup> "There is a presumption that every person has performed a duty enjoined by law or contract, unless the contrary appears."

simplification of what is required to cost justify price differentials. The new method of cost justification advanced is:

Even if the seller had said nothing whatever about his costs, still petitioner would have not been helpless. An examination of the items of savings claimed by petitioner will show this. Within a narrow margin of possible error the costs of shipping containers and the difference in carton costs on 24-count and 100-count packages can be ascertained by the buyer. The free deals referred to were public knowledge in the trade, and their terms were readily available to petitioner. The amount of the returns, allowances, and samples might vary considerably among sellers, but knowledge of the general policy of the particular seller in this area would afford a reasonable guide. Freight costs are available through published tariffs. The extent of any savings in sales costs is the least available of any of these items, but general knowledge of the trade affords a basis for approximating this if a margin for safety be allowed in the estimates. (Comm. Br. p. 42).

During the past 15 years the Commission has considered and rejected many cost studies. None has been accepted which even begins to approach the simplicity outlined above. Indeed, official pronouncements of the Commission state emphatically that "approximations and estimates" based on "general knowledge" are worthless.<sup>6</sup>

As early as 1938 the requisites of an acceptable cost study were set forth by the Chairman of the Commission, as follows:

Most concerns have known little about [distribution] costs. In preparing to justify their dis-

*Athens Roller Mills Company v. Commissioner of Internal Revenue*, 136 F. 2d 125, 128; *Planters' Operating Co. v. Commissioner of Internal Revenue*, 55 F. 2d 583, 586.

<sup>6</sup>"In formal proceedings before the Commission, where justification for price differences on the basis of cost differences is claimed . . . this claim must be substantiated by a detailed statement of costs of sales made to the several buyers or groups of buyers and of the analyses followed in finding those costs. Often it is necessary to make test studies in order to

counts under the act they have set out for the first time to discover the relative expense of packing full and broken cases, the expense attributable to paper work in placing and filling an order, the number of calls made per sale in serving different groups of customers and the average cost attributable to each call by a salesman.

*Such information can seldom be derived from the present books of account.* Packing costs have been determined by a stop-watch. Costs of handling invoices have been determined by counting the number of invoices or the number of entries for a period of time and attributing to each operation a charge based upon the personnel it took and the space it occupied during that period. Sales costs have been worked out by the timing of calls; the recording of the number of each type of calls made to each type of customer, the analysis of the comparative number of productive and non-productive calls, and the use of various devices for apportioning salesmen's salaries, commissions, and expense in accord with the facts discovered.

Since these methods of analysis are expensive, many concerns have done no more than select a sample territory or a sample period of time and to assume that the results of the sample are fairly representative of the rest of their business. *Of course, in instances where such sample studies have been offered to the Commissioner's investigational staff in justification of price differentials, a question has immediately arisen as to adequacy of these short-cut methods to show the relation of the costs to the discriminations* and the Commission's accountants have examined the books and the methods of doing business of the particular concern to determine whether the sample was fairly chosen and whether its results might be expected to be typical of the whole (Emphasis added).<sup>7</sup>

The Commission's suggestion for a simplified cost justification, which it adopts for the first time for the purpose "discover reasonable bases on which allocations of joint costs may be made," *FCC Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling* (1941), H. Doc. 287, 77th Cong., 1st Sess. p. 17,

of this appeal, just does not square with 15 years of practice.

Indeed, if this simplified cost justification procedure were to be adopted, then petitioner's lower prices were, in many instances, actually proved to be cost justified by the Commission itself in its case in chief and the Commission should have made a finding to that effect.

The Commission's brief points to petitioner's estimate of cost savings in its negotiations with Schrafft (Comm. Br. pp. 11, 41-42). Schrafft examined petitioner's estimated costs savings and its treasurer testified, in response to questions put by the Commission Trial Attorney, that cost savings to Schrafft in selling petitioner were as follows:

|               |      |          |
|---------------|------|----------|
| Sales costs   | 6%   | (R. 197) |
| Carton costs  | 2½   | (R. 195) |
| Freight costs | 3    | (R. 197) |
| Total         | 11½% |          |

This would have justified a price of \$2.21 per hundred to petitioner whereas it paid \$2.22 (R. 266).

Respectfully submitted,

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<sup>7</sup> Free, Accounting Problems Under the Robinson-Patman Act, 65 J. Accountancy 480.

Office Supreme Court U.S.  
FILED

JUN 25 1952

CHARLES ELMORE CROLEY  
CLERK

No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1952

AUTOMATIC CANTEEN COMPANY OF AMERICA,  
PETITIONER

v.  
FEDERAL TRADE COMMISSION

LIBRARY  
SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT.

MEMORANDUM FOR THE FEDERAL TRADE  
COMMISSION

# In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,  
PETITIONER

v.

FEDERAL TRADE COMMISSION

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT.*

## MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

The principal question presented by the petition concerns the proper construction of subsection (f) of Section 2 of the Clayton Act, which makes it unlawful for a buyer knowingly to induce or receive a discrimination in price prohibited by Section 2 of the Act. The question presented is basic to the application of subsection (f), and its determina-

tion is of great potential importance both to the general public and to the Federal Trade Commission in carrying out the duty of enforcing the statute.

The question of statutory interpretation which petitioner raises has not previously been before this Court and, in the opinion of the Government, it should be settled by this Court. The Government therefore does not oppose allowance of the petition for certiorari.

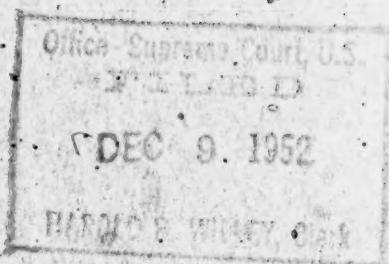
Respectfully submitted,

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*Solicitor General.*

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*General Counsel,*  
*Federal Trade Commission.*

JUNE 1952.

LIBRARY  
SUPREME COURT, U.S.



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OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF FOR THE FEDERAL TRADE COMMISSION

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# In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT

---

BRIEF FOR THE FEDERAL TRADE COMMISSION

---

## OPINIONS BELOW

The opinion of the Court of Appeals (R. 516), affirming and granting enforcement of the Commission's order, is reported at 194 F. 2d 433. The opinion of that court denying petitioner's application for rehearing and motion for leave to adduce additional evidence (R. 536) is reported at 194 F. 2d 439.

## JURISDICTION

The final decree of the Court of Appeals was entered on March 10, 1952 (R. 538). The petition for writ of certiorari was filed on May 29,

1952, and granted on October 13, 1952 (R. 544). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

#### QUESTIONS PRESENTED

The following questions are in controversy:

1. Whether the Commission, in a proceeding under Section 2 (f) of the Clayton Act, must prove that the buyer "knew" that discriminatory prices knowingly induced and received were not justified by differences in cost of manufacture, sale, or delivery.
2. Whether petitioner, on this record, can validly assert that the Act, as construed below, denies it due process, either as indulging unconstitutional presumptions or as imposing an impossible burden of proof.
3. Whether the court below erred in denying petitioner's motion to adduce additional evidence.

On a fourth question, namely, whether the court erred in granting the Commission's cross-petition for enforcement of its order, respondent concedes that this Court's decision in *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, requires reversal of the decision below, insofar as it granted such enforcement. Hence that question is not in controversy here.

#### STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1521, 15, U. S. C. 13, provides in pertinent part:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, \* \* \* and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; \* \* \* *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hear-

ing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

\* \* \* \* \*

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

#### STATEMENT

#### PROCEEDINGS BELOW

On March 19, 1943, the Federal Trade Commission issued its complaint (R: 3-11) charging petitioner with violation of Sections 2 (f) and 3 of the Clayton Act. It alleged that petitioner was engaged in the business of leasing automatic vending machines and in the purchase of candy

bars, chewing gum, nuts, and other confectionery products for resale to its distributors, who in turn offered them to the public through the vending machines leased from petitioner. Count II—which presents the only questions now at issue—charged that petitioner in the purchase of confection and nut products had been and was knowingly inducing and receiving from various sellers, discriminations in price in violation of Section 2 (f) of the Clayton Act.<sup>1</sup> Petitioner's answer (R. 12-14) was a general denial.

Extensive evidence was taken in support of the charges of the complaint. When the Commission completed its case-in-chief, petitioner filed a motion (R. 14-15) to dismiss Count II of the complaint for the reason that:

Counsel for the Commission have not proved a *prima facie* case in violation of the Robinson-Patman Act in that they have not proved, nor have they attempted to prove, that respondent [petitioner], who was the purchaser, "knowingly induced or received" price differentials which made more "than due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities involved were to such purchaser sold or delivered.

---

<sup>1</sup> Petitioner does not here challenge the order insofar as it relates to violation of Section 3, charged in Count I. (Pet. Br., p. 5.)

Upon a review of the evidence and consideration of briefs and oral argument the Commission denied this motion (R. 15-17), holding that a *prima facie* case had been established and that the question whether the price discriminations were justified by costs "need not at this stage of the proceeding be decided" (R. 17).

Petitioner elected to stand on its motion. It made no attempt to bring forward any evidence. Accordingly, the proceedings were terminated (R. 463-467), and after the filing of the trial examiner's recommended decision the matter came before the Commission for final disposition. The Commission made its findings as to the facts (R. 473-493), concluded (R. 493-494) that petitioner had violated Section 2 (f) as charged, and issued its order and opinion (R. 494-504).

Upon review the court below affirmed and granted enforcement of the Commission's order (R. 516-524). The court held, contrary to petitioner's contention, that proof of lack of cost justification and the buyer's knowledge thereof was not part of the Commission's case under Section 2 (f), but was a matter of defense. Thereafter the court (R. 536-537) denied a petition for rehearing on the ground that it presented no questions not fully considered in the original review; and also denied a motion for leave to adduce additional evidence on the ground that petitioner had no right to a "new hearing on a new theory of defense."

### THE COMMISSION'S FINDINGS

The findings as to the facts made by the Commission are not challenged here. Those especially significant to the issues before this Court may be summarized as follows:

Petitioner is engaged in leasing automatic coin-operated vending machines designed to dispense candy bars, chewing gum, nuts, and other confectionery products, and in the purchase of such confectionery products for resale, generally as a wholesaler, to lessees of its machines (R. 475). As of January 11, 1946, petitioner owned approximately 230,150 vending machines (R. 477) which it leased to some 83 distributors who operated the machines in 112 separate territories located in 33 states and in the District of Columbia (R. 475). Since its incorporation in 1931, and particularly since 1936, petitioner has enjoyed a rapid growth in business and attained a dominant position in the sale of confectionery products through vending machines. This expansion resulted primarily from the exclusive-dealing contracts which it used and the lower prices which it obtained on the products it purchased for resale (R. 490). Its sales increased from \$1,937,117 in 1936 to \$14,706,508 in 1942 (R. 491).

Petitioner knowingly induced and knowingly received from some 80 of the 115 suppliers from whom it purchased candy, gum, nuts, and other confectionery products prices which were lower

by from 1.2% to about 33% than prices paid by its competitors to the same suppliers for products of like grade and quality (R. 484). These differentials varied, within the range stated, among sellers and among products (R. 485).

One of the principal items purchased by petitioner was candy bars (R. 491) designed to retail at 5 cents each (R. 484). These candy bars were generally packaged by the producers thereof in cartons of 24, 60, and 100 bars. The standard or usual price<sup>2</sup> to competitors of petitioner from 1936 to 1942 was 64 cents for the 24-count package, \$1.50 for the 60-count, and \$2.50 for the 100-count package (R. 484, 485).<sup>3</sup> During this same period petitioner paid from \$1.95 to \$2.25 for 100-count packages in which it principally purchased such candy bars.<sup>4</sup> In 1942 the standard or usual price for candy bars in 100-count packages was increased to \$2.65, but petitioner only

<sup>2</sup> A witness described the character of this standard price thus (R. 58):

I would not say it was a custom [64 cents for 24-count], but when you are manufacturing an item that retails at a certain price, you have to make a spread from the manufacturer to the retailer for the various individuals that are involved in handling that to the trade, and at that particular point, sixty-four cents was recognized as the logical price to be charged for standard five cent items.

<sup>3</sup> Many suppliers refused to sell their candy bars to jobbers and wholesalers in 100-count cartons (R. 75, 239, 271, 273, 293, 314).

9

paid from \$2.00 to \$2.62 for such packages (R. 485).

The gross profits obtained by petitioner consisted almost entirely of the preferential discounts in price which it exacted. For example, from 1937 to 1945, inclusive, petitioner purchased from the Wrigley company \$8,823,728 worth of gum at a price of 38 cents per 100 sticks. Other purchasers competing with petitioner or its distributors paid Wrigley 55 cents per 100 sticks, or approximately \$3,947,471 more than petitioners paid for the same quantity of gum. This difference in price amounted to approximately 96 percent of the \$4,091,386 gross profit realized by petitioner on the resale of such gum for the period mentioned (R. 486-487).

After finding in considerable detail that the effect of the various discriminations in price obtained by petitioner "has been and may be" injurious to competition and promotive of monopoly (R. 488-490), the Commission found that petitioner used various methods in actively soliciting and inducing the discriminatory prices it received (R. 491-493). One method was to inform prospective suppliers of the prices and terms of sale which would be acceptable to petitioner without consideration or inquiry as to whether such prices could be justified on a cost basis (R. 492). At times petitioner refused to buy unless the price to it was reduced below the

price at which the particular supplier sold like merchandise to others' (R. 492-493). In other instances, petitioner sought to explain to the prospective supplier that certain elements of the supplier's cost could be eliminated which would, in petitioner's opinion, justify a lower price than what petitioner considered to be a standard price. Thus in letters to The Curtiss Candy Company on November 15, 1939, and to W. F. Schrafft & Sons Corporation on February 15, 1937, petitioner summarized (R. 493) alleged savings to these companies as follows:<sup>4</sup>

<sup>4</sup> See for example the following testimony of suppliers concerning negotiations with petitioner: "[Petitioner's representative stated that our price] didn't fit into his picture, it was too high for him \* \* \*" (R. 214).

"He told us very frankly that our price would not fit into his picture because it was too high" (R. 216). The price quoted was "the same price as we would quote to everybody" (R. 215).

"They were seeking a lower price on our regular pack, 24-count pack price" (R. 228).

"\* \* \* If we expected to do business with him, we would have to give them a better price than our established 24-count price" (R. 231).

(See also R. 196, 277, 313.)

Though not included in the findings, the reply by Schrafft (R. 291) is illuminating. It said in part:

"\* \* \* Our freight costs are probably not over half of the figure you specified. Our sales cost and carton cost are much lower. We do not offer free deals and our sampling expense is very moderate."

| Alleged Savings                            | Curtiss<br>Co. | Ehrhaft<br>Corp. |
|--|----------------|------------------|
| (1) Freight savings of.....                | 6%             | 5% to 7%         |
| (2) Sales cost savings of.....             | 7%             | 7%               |
| (3) 24-count cartons savings of.....       | 5%             | 5%               |
| (4) Return and allowances savings of.....  | 1%             | 1% to 2%         |
| (5) Free deals and samples savings of..... | 8%             | 2% to X%         |
| (6) Shipping containers savings of.....    |                | 1% to 2%         |
| Total deductions.....                      | 27%            | 21% to 25%       |

Petitioner knew that many of the prices which it induced and received were lower than prices paid by its competitors to the same sellers for like goods. This knowledge was based on common trade information that the items purchased were standard-price items and that sales by most suppliers were based on that standard. In some instances petitioner was directly informed by suppliers that the prices it received were lower than those given to other customers (R. 491). Numerous suppliers so advised petitioner (R. 491, 492). The Town Talk Company did so by letter (R. 492) saying:

At all times we have made sales to your Company at substantially lower prices than we made to other Companies and also at substantially lower prices than our ceiling price.

\* There are many instances of specific statements to petitioner on this point in the record, for example:

The Mason Au & Magenheimer Confectionery Mfg. Co., advised (R. 421) on April 19, 1939—

Our price to you on our candies which you use is \$1.95

for 100 count cases and this figured out in 24 count boxes

The Commission's findings neither summarize all of the evidence which supports them nor attempt to characterize the purchasing practices of petitioner. The record in this case discloses the persistent and continuous activities of a large buyer in wheedling and even coercing suppliers into granting it discriminatory prices. The methods used varied to meet particular situations but the goal remained the same. Thus, the witness Melster testified that he could not get peti-

brings the price down to 46½¢ per box, which you can see is a decidedly lower price than we get from our regular jobbing trade. Our price to you is so low that as it stands, it is just about at the break-even point, but we like the business on account of the distribution and the prestige that we get from such business from you \*\*\* \*

The Planters Nut & Chocolate Co., on December 5, 1941 (R. 427) after quoting petitioner a price of \$2.30, stated—

As you may know, our regular price for this same merchandise that you are buying is \$2.50 per carton of 100 packages, full-freight allowed.

The National Licorice Company wrote on September 17, 1941 (R. 425) advising—

Although we are increasing the price of twenty-four count NIBS one cent a box on September 22, as you were informed in our letter of September 12 we are maintaining the price of NIBS in the one hundred count despite the fact that our manufacturing costs have advanced considerably. The 2% cash discount represents most of our profit in this package.

It is also clear that petitioner had full knowledge in instances where lower prices were purportedly based upon cost savings, for a buyer cannot negotiate with a seller for a lower price based on cost savings in dealing with him, as compared with other customers of the seller, without knowing that he is seeking a different price than that charged others. Petitioner concedes this (Pet. Br. p. 29).

tioner's officials to name a price acceptable to petitioner, because they stated: " \* \* \* We don't dictate any price because we don't want any blood on our hands." (R. 310.) Yet other suppliers somewhat differently situated testified they were told what the price should be. Thus, the witness Schmidt (R. 236) stated:

\* \* \* As far as I know in all my negotiations with them at the start there was the price.

[Petitioner's attitude was:]

If you make goods for us we can give you some nice business and we needed business.

Petitioner asked large suppliers like Curtiss and Schrafft for alleged cost savings in the form of reductions in their regular prices. One variation of the "cost savings" theme is exemplified by the testimony of Walter Mann of the Wilbur-Schuchard Chocolate Company. In this instance petitioner was quoted the standard and established price. In response, petitioner outlined the reasons why such a price would not be acceptable and made it clear that this company could not expect to obtain that price because its product was not as well known as similar products and that it would have to sell at a lower price than "competitive bars" that were more in demand

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<sup>1</sup> For other examples see R. 69, 70, 305, 254, 279, 345, 372-373.

would sell for" (R. 148). This seller was also advised that it could not expect to sell to petitioner at the price it was receiving from some other class of customers. Having established these factors as a base, the petitioner then continued the negotiations with a discussion of cost savings, but the alleged sayings were to be applied not to the standard price but to a price decided upon by petitioner without reference to cost factors. (R. 147-153, 165, 166.)

#### SUMMARY OF ARGUMENT

##### I

Section 2 (f), making it unlawful for a buyer knowingly to induce or receive a "discrimination in price which is prohibited by this section" refers to a discrimination in price prohibited by Section 2 (a). This Court has held that the elements of an unlawful discrimination in price necessary to support an order under Section 2 (a) are: (1) a difference in price; (2) on goods of like grade and quality; (3) the effect of which may be injurious to competition. *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37. But petitioner contends that a price differential does not become a "discrimination in price" under Section 2 (f) until it is shown that the discrimination makes, and that the buyer knew that it made, more than due allowance for differences in the seller's cost. This adds another element to a *prima facie* case against a buyer, so that two different definitions of discrimination

in price would result. If petitioner were correct, it would clearly be possible to have a discrimination in price violative of Section 2 (a), the knowing inducement of which would not violate Section 2 (f) unless and until an additional element consisting of lack of cost justification and the buyer's knowledge of that lack were affirmatively shown.

The language and history of Section 2 (f) demonstrate that it is but the complement of Section 2 (a); is directed at the same discriminations prohibited by Section 2 (a), and imposes equal liability upon the buyer when it is established that he knowingly induced or knowingly received the discrimination prohibited by Section 2 (a).

This Court's determination in the *Morton Salt* case, *supra*, at pages 44-45, of the relationship between the general prohibition of the statute and the provisos, is not limited to proceedings against sellers. The decision depended in the first instance on the ordinary rule of statutory construction that the burden of proving justification for exemption under a special exception generally rests on one who claims its benefits. Secondly, the court pointed to the procedural provision of Section 2 (b) that when a *prima facie* case of discrimination in price has been made out, the burden of justification "shall be upon the person charged with a violation of this section." Section 2 (f) is a part of "this section" and the elements of a *prima facie* case under Section 2 (a) are those pre-

viously stated. They do not include proof of lack of cost justification.

Petitioner attempts to escape the language of Section 2 (b) by asserting that the "person" referred to must be a seller charged with discrimination in price under Section 2 (a). This perverts the language of Section 2 (b) which says nothing about *a person charged with discrimination in price*. The exact language is: "Upon proof being made, at any hearing on *a complaint under this section, that there has been discrimination in price* \* \* \* the burden of \* \* \* showing justification shall be upon the person charged with a *violation of this section*." [Emphasis supplied.] Here, in "*a complaint under this section*" (Section 2 (f)), the Commission has established a *prima facie* case of "discrimination in price." Hence the burden of justification is plainly placed on petitioner as "*the person charged with a violation*".

## II

Petitioner argues that as construed below Section 2 (f) denies due process. Though stated differently, the argument has but two points: (1) that it was presumed that the price discriminations involved exceeded the cost differences, and based thereon, that petitioner had knowledge of that fact, (2) that proof of cost justification by a buyer is impossible.

The decisions below held that the burden of cost justification was on petitioner and was not

a part of the Commission's *prima facie* case. On this construction, no such presumptions were or could have been indulged against petitioner. The case is simply one of statutory construction. If a showing of lack of cost justification and petitioner's knowledge thereof were a necessary element of the Commission's case, as petitioner contends; then it proved no violation of Section 2 (f).

Petitioner's assertion of impossibility of proof is made in the face of its refusal to attempt to meet its statutory burden. This Court is being asked to hold, without any factual basis, that it would necessarily have been impossible for petitioner to show cost justification. Constitutional questions are not to be decided hypothetically. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352-353. Only if it could be said in advance of resort to it that statutory procedure is incapable of affording due process is there any legal excuse for failure to resort to it. *Yakus v. United States*, 321 U. S. 414, 435. Neither can it be assumed that the Commission would deny due process or deny such hearing as the Constitution prescribes. *Yakus v. United States, supra*, and cases cited.

Actually, proof of cost justification by petitioner was by no means impossible. The record affirmatively discloses that petitioner was not without information as to its sellers' costs. Petitioner refers to the numerous discriminations and sellers involved; as to this it could have moved

the Commission to elect a limited number of instances upon which it would rely. It speaks also of the intricacies of cost accounting. But if a lower price was in fact negotiated with the seller in good faith upon the basis of cost savings resulting from the "differing methods or quantities" in which the goods were "sold or delivered" to it, obviously the methods and quantities would have been identified, as well as the amounts of any resulting savings in cost. These facts could have been developed from the parties to the negotiations. Furthermore, in proceedings before the Commission involving cost accounting, if the other parties are willing to do so, it is normal to dispense with the production of records, substituting a check of the facts and data, produced at the hearings, by Commission accountants at the offices of the party who supplied them.

### III

Petitioner complains that it was unduly prejudiced by refusal of the court below to remand the case to the Commission to permit petitioner to establish the impossibility of proving cost justification, and petitioner impliedly suggests this Court should order such a remand. Petitioner did move the court below for leave to adduce additional evidence, but not until the case had been decided against it. There were no reasonable grounds for the failure of petitioner to put in its

defense when the proceeding was before the Commission. Belief that the Commission had not made out a *prima facie* case or that the statute was unconstitutional is no excuse. The statutory provision respecting leave to adduce additional evidence is not to be abused by resort to it as a mere instrument of delay. *Southport Petroleum Company v. Labor Board*, 315 U. S. 100, 104. It was not an abuse of discretion for the court below to deny petitioner's motion.

#### **ARGUMENT**

##### **I**

#### **THE COMMISSION AND THE COURT BELOW CORRECTLY CONSTRUED THE ACT**

A. THE FINDINGS THAT PETITIONER KNOWINGLY INDUCED AND RECEIVED DISCRIMINATORY PRICES HAVING ADVERSE EFFECTS UPON COMPETITION ESTABLISHED PRIMA FACIE A VIOLATION OF SECTION 2 (f).

Petitioner contended in the court below that "Section 2 (a) \* \* \* defines discriminations in price as 'differentials' which make more than 'due allowance for differences in the cost of manufacture, sale, or delivery \* \* \*'" (Pet. Br. in Ct. of App., p. 14). The same basic view, though not so openly stated, pervades its position here. This is illustrated by the statement that what is prohibited to the buyer is the knowing inducement or receipt of " \* \* \* a price differential which he knows makes more than 'due allowance' for differences in the seller's cost of manufacture, sale, or

delivery, for not until this is shown does the differential become a 'discrimination in price which is prohibited by this section.'" [Pet. Br., p. 28, emphasis supplied.] Upon this premise petitioner has built a major phase of its argument.<sup>8</sup>

Petitioner's argument simply ignores the fact that Section 2 (a) prohibits in general terms price discriminations which are likely to injure competition, and that while justification is permitted under the provisos of Section 2 (a), it is only as an exception to the general prohibition—the provisos do not otherwise modify, change, or alter that general prohibition.

Section 2 (f) of the Clayton Act, as amended by the Robinson-Patman Act (quoted *supra*, p. 4), makes it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section." Inasmuch as Section 2 (a) is the only part of Section 2 which prohibits discriminations in price, it is clear that "prohibited by this section" in Section 2 (f) necessarily refers to discriminations prohibited by Section 2 (a). A *prima facie* case of violation of Section 2 (f), therefore, consists of a showing of the same elements which make a discrimination in price violative of Section 2 (a), plus the additional element of having induced or received such discrimination with knowledge of the facts which made it violative of Section 2 (a). The elements which make out a

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<sup>8</sup> See also Pet. Br., pp. 29, 41, 45, 46, 54.

*prima facie* case of violation of Section 2 (a), aside from jurisdictional requirements, are a difference in price, on goods of like grade and quality, the effect of which may be injurious to competition. This Court so held in *Federal Trade Commission v. Morton Salt Company*, 334 U. S. 37, 45.

As the Senate Committee observed,

Section 2 (a) attacks directly the problem of discrimination in prices and terms of sale. Like present section 2 of the Clayton Act it contains a general prohibition against such discriminations, from which certain specified exceptions are then carved, thus throwing upon any who claim the benefit of those exceptions the burden of showing that their case falls within them.

S. Rep. No. 1502, 74th Cong., 2d. Sess., p. 3;<sup>10</sup> see also H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8. In short, under Section 2 (a) price discrimination between purchasers is *prima facie* unlawful if it has the requisite adverse effect on competition. While the statute permits certain exceptions to its general prohibition of price discriminations

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<sup>10</sup> To the same effect see *Corn Products Refining Company v. Federal Trade Commission*, 324 U. S. 726; *Federal Trade Commission v. A. E. Staley Mfg. Company*, 324 U. S. 746; *Standard Oil Company v. Federal Trade Commission*, 340 U. S. 231; *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470.

<sup>11</sup> Section 2 (a) of the Senate bill, as reported, was substantially similar to 2 (a) as enacted. The Senate bill, as reported, however, contained no provisions comparable to Sections 2 (b) or 2 (f) of the Act.

likely to injure competition, one who claims the benefit of such an exception is seeking "justification or exemption under a special exception to the prohibitions of a statute." *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. at 34.

Section 2 (f) differs from Section 2 (a) only in containing the express requirement that the buyer shall have "knowingly" induced or received such price discriminations. This requirement parallels the provision in Section 2 (a) that price discriminations are prohibited if they tend to "prevent competition with any person who either grants or knowingly receives the benefit of such discrimination." (Emphasis added.) With respect to the meaning of "knowingly" in Section 2 (a) the Conference Report states:

The word "knowingly" appears in the Senate amendment immediately before the words "receives the benefit of such discrimination". The House conferees accepted this amendment. Its purpose is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination. [House Report 2951, 74th Cong., 2d sess., pp. 5-6.]

While this explanation was not repeated in connection with Section 2 (f), the Conference Report

did mention other respects in which that section was intended to "harmonize with subsection (a)." *Id.*, p. 8. And no reason appears in the legislative history for attributing to the word "knowingly" a different connotation when it stands in Section 2 (f) from that which it bears in Section 2 (a).

These statements indicate that Congress regarded buyers who obtain discriminatory prices by special solicitation, negotiation, or other arrangement as standing in the same light as sellers who grant such prices. Under this construction the buyer would not be responsible for prices which he receives in the ordinary course of business, including quantity or other discounts under an open scale of prices, even though some of those prices may actually be unlawful discriminations, unless such discriminatory prices were the result of his own activities. The buyer is not made keeper of the seller's conscience—only his own. Responsibility attaches to the buyer only when through his own activities he obtains a special price which discriminates in his favor and against his competitors. It follows, therefore, that the buyer needs to concern himself only with those lower prices in the granting of which he plays a significant part.

That the Commission has so understood the legislative intent and adhered to it is apparent from an examination of the proceedings it has

brought under section 2 (f). Up to and including this case, the Commission has had eleven proceedings alleging violation of Section 2 (f),<sup>11</sup> in ten of which it issued orders to cease and desist. An examination of these proceedings will show that in each of them there was active inducement by the buyer of the lower prices obtained. It will also be observed that the proceedings fall into two general classes: (1) Those in which the buyer in obtaining the discriminatory price used some scheme which involved deception approaching, if not amounting to, fraud upon the sellers; (2) Those which represent a persistent and active use of size, prestige, or powerful connections by a buyer as a means of exacting discriminatory prices.

Thus in the Commission's view, a *prima facie* case is made out against a buyer if there are shown (a) the facts requisite to make out a *prima facie* case against the seller, i. e., price discrimination in the sale of goods of like grade and

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<sup>11</sup> *Bird & Son, Inc., et al.*, 25 F. T. C. 548; *Pittsburgh Plate Glass Company, et al.*, 25 F. T. C. 1228; *Golf Ball Manufacturers' Association, et al.*, 26 F. T. C. 824; *Miami Wholesale Drug Corporation, et al.*, 28 F. T. C. 485; *A. S. Aloe Company*; 34 F. T. C. 363; *American Oil Company and General Finance, Inc.*, 29 F. T. C. 857; *E. J. Branch & Sons*, 39 F. T. C. 535; *The Curtiss Candy Co.*, 44 F. T. C. 237, modified, 48 F. T. C. 161; *Atlantic City Wholesale Drug Company, et al.*, 38 F. T. C. 631; *Associated Merchandising Corporation, et al.*, 40 F. T. C. 578; *National Tea Company*, 46 F. T. C. 829, modified, 47 F. T. C. 1314.

quality in interstate commerce which adversely affects competition, and (b) that the buyer affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action taken by him. Since the Commission here found that petitioner had affirmatively, and indeed most vigorously "induced" the granting to it of discriminatory prices, which it knew to be discriminatory, *supra*, pp. 7-14, it properly concluded that a *prima facie* case had been made out against petitioner.<sup>12</sup>

Petitioner, however, argues for a construction of Section 2 (f) which would put the buyer who affirmatively solicits the granting to him of prices which he knows to be discriminatory in a more favorable position than the seller who merely yields to the buyer's inducements. It contends that the statute means one thing as to a seller and another as to a buyer. While claiming the benefit of the provisos to Section 2 (a), it insists that as applied in Section 2 (f) they should not be treated as provisos. (Br. p. 28.) And it argues further that the Commission must not only show that the discriminations were not cost-justified; it must prove what lay in the mind of the buyer who demanded them.

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<sup>12</sup> Petitioner's suggestion that it is guilty merely of "receiving a lower price", e. g., Brief, p. 29n, of course ignores the fact that it was the moving party in soliciting discriminations.

If petitioner's argument were correct, it would clearly be possible to have a discrimination in price prohibited by and violative of Section 2 (a), the knowing inducement of which would not violate Section 2 (f), because the Commission would not in the latter instance have shown that the price differential was not cost-justified, and that the buyer knew that fact. The anomaly is most clearly shown in a proceeding in which the seller and buyer were joined, the former being charged with granting certain discriminations in price in violation of Section 2 (a) and the latter with having knowingly induced and received the same discriminations in violation of Section 2 (f). Assume that in such a proceeding the Commission successfully established the existence of all the elements required under the *Morton Salt* case; that the buyer induced these discriminations in price knowing the presence of those elements; and that neither the seller nor the buyer made any defense. If petitioner were correct in its argument, then in the circumstances stated an order might issue against the seller but not against the buyer, because the Commission did not prove that the discriminatory price was not justified by costs.

Nothing in the legislative history affords any warrant for saying that the Act means one thing as to a buyer and another thing as to a seller. That history indicates rather that the buyer who actively induces a discriminatory price was re-

garded as on an equal footing with the seller who charges a discriminatory price.<sup>13</sup> Indeed, the bill was in very considerable part aimed at curbing the activities of large buyers who relied on their economic power to exact price concessions from sellers often much smaller than they. As this Court stated in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 43:

\* \* \* The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer

<sup>13</sup> Congressman Utterback, in explaining the conference bill to the House, stated with reference to Section 2 (f):

The closing paragraph of the Clayton Act amendment, for which section 1 of this bill provides, makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. \* \* \*

This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment. [80 Cong. Rec. 9419.]

Subsection (f) was introduced in substantially its present form as an amendment offered by Senator Copeland to the Robinson bill when that measure was before the Senate for consideration. No extended discussion was then had and the only significant statement made was that of Senator Robinson who said:

This amendment makes the person who knowingly receives an unfair discriminatory price also liable; and I think it is sound in principle. [80 Cong. Rec. 6428.]

solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

The record in the present case reflects activities of a large buyer which clearly fall within the foregoing description.

**B. SECTION 2 (b) PLAINLY CASTS THE BURDEN OF JUSTIFICATION UPON THE BUYER, ONCE SUCH A PRIMA FACIE CASE IS ESTABLISHED**

Section 2 (b) specifically places upon the "person charged with a violation of this section" the burden of "rebutting the *prima-facie* case thus made by showing justification." Its terms permit no distinction between charges of violation of Section 2 (f) and of Section 2 (a). Whichever of those sections is invoked, the "person charged" bears the burden which section 2(b) imposes.

This Court, in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 44, 45 decided the relationship of the provisions of subsection (a) to the general prohibition of the statute, and the significance in that regard of the burden of proof imposed by subsection (b). Contrary to petitioner's argument (Pet. Br. p. 30) this Court did not rest its opinion on the ground that the pro-

ceeding was against sellers. It initially applied the general rule of statutory construction "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits," and in announcing that general rule referred to the authority of *Javierre v. Central Altágracia*, 217 U. S. 502, 507-508 and cases cited therein. The opinion of this Court in the *Morton Salt* case, 334 U. S. at pages 44, 45 states:

First, the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,<sup>14</sup> requires that respondent undertake this proof under the proviso of § 2 (a). Secondly, § 2 (b) of the Act specifically imposes the burden of showing justification upon one who is shown to have discriminated in prices. And the Senate committee report on the bill explained that the provisos of § 2<sup>15</sup> (a) throw "upon any who claim the benefit of those exceptions the burden of showing that their case falls within them." We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving

<sup>14</sup> *Javierre v. Central Altágracia*, 217 U. S. 502, 507-508, and cases cited. [Court's footnote.]

<sup>15</sup> Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also 80 Cong. Rec. 3599, 8244, 9418. [Court's footnote.]

competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.<sup>16</sup>

The Court also referred to Section 2 (b), which specifically places the burden of justification "upon the person charged with a violation of this section," as confirmatory of this rule. Petitioner, however, has argued (Pet. Br., pp. 31-36) that Section 2 (b) has no application to a buyer charged under Section 2 (f). That contention ignores the plain language of Section 2 (b), which makes no such distinction. But even if Section 2 (b) were not in the Act, petitioner's position would be no better. The legislative history of the procedural part of Section 2 (b) demonstrates that it is merely declaratory of the established rules as to the burden of proving statutory exceptions and intended to remove any possible doubt that such burden is to apply in Robinson-Patman Act proceedings before the Commission.<sup>17</sup> It simply makes definite and certain

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<sup>16</sup> See *Moss, Inc., v. Federal Trade Commission*, 148 F. 2d 378, 379, holding that proof of a price differential in itself constituted "discrimination in price," where the competitive injury in question was between sellers. See also *Federal Trade Comm'n v. Cement Institute*, 333 U. S. 683, 721-726. [Court's footnote.]

<sup>17</sup> Congressman Utterback in explaining the Conference Report to the House explained the procedural part of Section 2 (b) as follows:

Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects

that the provisos of Sections 2 (a) and 2 (b) are not to be construed as matters constituting a part of the general prohibition of the statute.<sup>18</sup>

The procedural part of Section 2 (b) refers to "a complaint under this section," and Section 2 (f) is a part of "this section." It places the burden of justification upon "the person charged with a violation of this section." Petitioner contends that this language is without significance as to Section 2 (f) because that section was added after the framing of Section 2 (b).<sup>19</sup> Its contention necessarily rests upon an assumption that as additions are made to a bill in the legislative process, those who offer them and those who adopt them are unaware of the relationship of the new to the old and do not intend the result accomplished. Such a position is not

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apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof, substantially as suggested above, as applicable to hearings before the Federal Trade Commission. [80 Cong. Rec. 9418.]

<sup>18</sup> See, Austin *Price Discrimination and Related Problems Under the Robinson-Patman Act*, pp. 150-151.

<sup>19</sup> Contrary to petitioner's assertion (Apdx. Pet. Br., p. 63), section 2 (b) was not in the original House Bill, H. R. 8442. It was in the bill as reported with amendments to the Committee of the Whole House as Section (e). In the House Report (No. 2287, 74th Congress, 2d Sess., p. 16) it was stated: "Section (e) down to the proviso merely lays down directions with reference to procedure, including a statement with respect to burden of proof."

tenable. It also ignores the fact that section 2, in the form in which it was finally passed, had the consideration of a conference committee required to harmonize the differing provisions of the House and Senate bills, as well as the final action of the Congress.

"When the three sections here involved are read together, the direction of the statute is plain. Section 2 (f) makes unlawful the knowing inducement or receipt of a discrimination in price prohibited by Section 2 (a). The discrimination in price prohibited by Section 2 (a) is that "between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, \* \* \* and where the effect of such discrimination may be \* \* \* to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them \* \* \*". In terms, Section 2 (b) provides that when such a discrimination has been shown, the burden of justification<sup>20</sup> shall be upon "the person charged with a violation of this section."

Petitioner attempts to escape the language of Section 2 (b) by contending that "the 'person' referred to must be one charged with 'discrimination

<sup>20</sup> "Justification," as used in Section 2 (b), refers to the defenses created by the provisos of Sections 2 (a) and 2 (b). *Standard Oil Company v. Federal Trade Commission*, 340 U. S. 231, 241.

in price' under 2 (a) \* \* \*, i. e., the seller." (Pet. Br., pp. 31, 32). This perverts the language of Section 2 (b), which says nothing about a *person charged with discrimination in price*. The exact language is: "Upon proof being made, at any hearing on *a complaint under this section*, that there has been *discrimination in price* \* \* \* the burden of \* \* \* showing justification shall be upon the person charged with a *violation of this section*." [Emphasis supplied.] Here, in "*a complaint under this section*" the Commission has shown a "*discrimination in price*." Hence the burden of justification is plainly placed on petitioner as "*the person charged with a violation*."

## II

### AS THUS CONSTRUED, SECTION 2 (f) IS NOT SUBJECT TO CONSTITUTIONAL ATTACK

Petitioner has argued at length (Pet. Br. 36-54) that Section 2 (f) as construed by the court below is unconstitutional because it entails a denial of due process. As presented, the argument is divided into three parts:

1. That there is "no rational connection" between the facts proved (price differences) and the facts presumed by the Commission and the court below; namely, price discriminations in excess of the seller's cost differences and the knowledge thereof on the part of the buyer (Pet. Br., pp. 37-44).

2. To require a buyer to justify price discriminations in effect creates a conclusive presumption and precludes the buyer from presenting its defense to the main fact presumed (Pet. Br., pp. 44-52).

3. The interpretation by the court below placing justification on the party charged results in an arbitrary classification (Pet. Br., pp. 52-54).

Though divided into three parts, the foregoing argument actually involves but two points: (1) that the decisions below rested upon presumptions of fact; and, (2) that it is impossible for a buyer to show cost justification. We shall attempt to show that neither argument has merit in the circumstances of this case. Because the argument is based on erroneous premises, the authorities cited by petitioner have no application here.

#### A. THE CONSTRUCTION BELOW RAISES NO PRESUMPTIONS

Petitioner's whole position on presumptions is epitomized in its statement (Pet. Br., p. 41):

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in excess of the seller's cost differences and *knowledge thereof* on the part of the buyer.

Furthermore, in attempting to apply the *prima facie* provisions of the act to the

buyer, the court below seeks to pyramid presumptions. It first presumes that the price differentials exceeded the cost differences. Based upon this first presumption it then presumes further or secondly that petitioner had knowledge of this fact. Presumptions cannot be pyramided. \* \* \*

But the fact is that the decisions of the Commission and the court, below make certain beyond any doubt that no such presumptions were indulged.

Both the Commission and the court below held that a showing of an absence of cost justification, and petitioner's knowledge of that fact, were not a part of the Commission's *prima facie* case. The decisions were that the burden of showing cost justification was upon petitioner. In these circumstances the presumptions stated by petitioner do not, and can not, arise from the construction below.

Petitioner's argument wholly misapprehends the construction and effect of section 2. The statutory scheme is a general prohibition declaring unlawful *all* discriminations in price where the effect "may be" injurious to competition, but permitting "the person charged with a violation of this section" to justify an otherwise prohibited discrimination in price by showing that it comes within the terms of, and is thereby excused by, the provisos. If a showing of lack of cost justification and petitioner's knowledge

thereof were a necessary element of the statutory offense, as petitioner contends, then the Commission did not prove violation of Section 2 (f) by petitioner. The decisions below are, however, that such a showing is not an element of the offense, but a matter of justification. The decisions, in other words, are, not that the Commission had successfully negated justification by the use of presumptions, but that it was not required to negate justification at all. The case is simply one of statutory construction, and is not concerned with presumptions or the pyramiding of presumptions.

It will be observed that no fact which need be established under the terms of the provisos in order to show justification in any way rebuts or contradicts any element of a *prima facie* case under the general prohibition of the section. It follows, therefore, that the section establishes no presumptions, either rebuttable or conclusive. It simply permits an otherwise unlawful discrimination to be excused under the terms and conditions which Congress believed would contribute to the general purposes of the section, and places the burden of so justifying upon the person charged with violation.

The sole question, then, is whether placing this burden upon a buyer deprives him of due process, on the ground that it is impossible for a buyer to sustain his burden.

**B. IT IS NOT SUFFICIENT MERELY TO ASSERT IMPOSSIBILITY OF PROOF**

Petitioner did not plead justification nor make any effort whatever to prove it, but at the close of the Commission's case-in-chief simply moved to dismiss the complaint. The ground for this motion, as to Section 2, (f), was that Commission counsel did not show or attempt to show that the discriminations in price knowingly induced by petitioner made, to its knowledge, more than due allowance for the cost differences of the seller, and had therefore failed to establish a *prima facie* violation of the Act (R. 14). This motion was denied. Petitioner then stood upon its position that the Commission had not made out a case and petitioned the Court of Appeals to set aside the order issued.

The court below, having in mind that the claim of impossibility of proof rested solely upon petitioner's bare assertions, and was without any factual basis in the record to sustain it, held (R. 523):

\* \* \* It is not enough just to assert that proof is not available, or is impossible. *Tennessee Consolidated Coal Company v. Comm.*, 117 F. 2d 452. As the Court said in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352, 353, "Impossibility of proof may not be assumed." \* \* \* Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the

facts." And when petitioner chose not to introduce any evidence as to the facts it may not now say that the defense allowed by the Act is useless or impossible of proof. \* \* \*

This view is in accord with the holding by this Court in *Yakus v. United States*, 321 U. S. 414, 435. There the petitioners had failed to seek the administrative remedy and statutory review which were open to them and had not shown that had they done so any of the consequences which they apprehended would have ensued. This Court said:

\* \* \* Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309; *Anniston Mfg. Co. v. Davis*, *supra*, 356-7; *Minnesota v. Probate Court*, *supra*, 275, 277.

The court below also stated (R. 523-524):

\* \* \* But we cannot say that it is unreasonable or arbitrary to expect a buyer who induces or knows that he is receiving prices substantially lower than his competitors to make some good faith efforts to ascertain that such lower prices are justified by lower costs in the sales to him.

Nor can we assume that the Commission will be so arbitrary or unreasonable as to the quantum of proof required of the buyer in a proceeding under §2 (f) as to deprive him of due process.

This also accords with the holding by this Court in *Yakus v. United States*; 321 U. S. at p. 434:

\* \* \* In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 554; *Minnesota v. Probate Court*, 309 U. S. 270, 277, and cases cited.

It is apparent that petitioner is asking the Court to decide a constitutional question upon a hypothetical basis. This Court observed in *Aniston Mfg. Co. v. Davis*, 301 U. S. at p. 353, "Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 208-210."

#### C. JUSTIFICATION BY THE BUYER IS NOT IN FACT IMPOSSIBLE

As a matter of fact, even the assertions by petitioner of impossibility of proof of cost justi-

fication are without basis. If impossibility of proof actually existed, this would have appeared had petitioner made a good-faith effort to establish justification as permitted by the statute. But the record before the Court contains no factual basis for petitioner's assertions.

It may well be that petitioner was aware that if the facts were produced they would show that the discriminations in price which it knowingly induced were not cost-justified. There are sufficient facts now in the record concerning petitioner's relationships with some of its suppliers strongly to indicate, if not establish, that particular discriminations in price were not and under no circumstances could be justified on the basis of savings in cost.<sup>21</sup>

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<sup>21</sup> Petitioner's difficulty is suggested by instances wherein the price was fixed without reference to cost factors (see R. 69, 106-107, 252; 254); and the instances in which the price was apparently based in part on what petitioner paid others (R. 95, 241), or was intended to reflect the fact that petitioner's cost of doing business was higher than that of competitors (R. 91, 241). The difficulty is further suggested by the fact that at least one supplier found the price "rather difficult for us to explain" (R. 84); and others found the suggested savings limited (R. 195-197, 259) or non-existent (R. 188).

It may also be observed that while most suppliers mentioned savings in "selling costs", it appears that in some instances at least this merely reflected an allowance in lieu of brokerage (R. 362-363) which is specifically prohibited by Section 2(c). Price concessions made because petitioner was considered a good credit risk (R. 35, 72, 96, 234-235, 257, 299, 305) or because of the "distribution" afforded by its

In any event, the asserted impossibility of proof rests principally upon three grounds: one, the unavailability to petitioner of evidence as to its suppliers' costs; two, the large number of suppliers and discriminations involved; and, three, the intricacies and difficulties of distribution cost accounting. A further, but implied ground appears to be based upon an assumption that the Commission would be arbitrary and unreasonable in the nature and quantum of proof required and with respect to the manner of its production, including refusal of compulsory process for that purpose. Without attempting to say what the results might have been had petitioner made a good-faith attempt to put in its defense, it seems desirable at least to indicate some of the weaknesses in the position it has assumed.

(1). Both general knowledge and the evidence of the present record refute the assertion of unavailability to petitioner of evidence of its sellers' costs. Large buyers are not so naive. An example from the record in the present case will show this. From petitioner's correspondence with W. F. Schrafft & Sons Corporation (R. 387-400), it will be noted that petitioner claimed that certain items

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lessees (R. 54, 84, 149, 164, 243, 257, 277, 285-286, 305); or the advertising value of sales to it (R. 59, 164, 197, 231, 257, 277, 306) would not, as the record now stands, seem to have any relation to allowable savings under the cost-justification proviso.

of cost savings in definite amounts resulted from its methods of purchase and delivery (R. 389). The seller's reply (R. 391) furnished its appraisal of petitioner's claimed cost savings in relation to actual costs. Similar discussions of particular items of cost occurred during petitioner's oral negotiations with many other sellers. (See p. 40, fn. 21 *supra*).

Even if the seller had said nothing whatever about his costs, still petitioner would not have been helpless. An examination of the items of savings claimed by petitioner will show this. Within a narrow margin of possible error the costs of shipping containers and the difference in carton costs on 24-count and 100-count packages can be ascertained by the buyer. The free deals referred to were public knowledge in the trade, and their terms were readily available to petitioner. The amount of the returns, allowances, and samples might vary considerably among sellers, but knowledge of the general policy of the particular seller in this area would afford a reasonable guide. Freight costs are available through published tariffs. The extent of any savings in sales costs is the least available of any of these items, but ~~general~~ knowledge of the trade affords a basis for approximating this, if a margin for safety be allowed in the estimates.

It should also be observed that if a seller is willing to negotiate a lower price with a buyer based on cost savings, such negotiations can only be conducted on the basis of identified savings and their amounts. This process alone will inform the buyer of the seller's position on costs, and further develop the points at which doubt as to the amount of savings appears. If the negotiations represent an honest effort to arrive at actual savings, rather than an effort to exact the last penny or even more, regardless of consequences, buyers do not stand in the position petitioner claims.

(2). Undoubtedly, a large number of suppliers and discriminations in price appeared in the Commission's case-in-chief. If petitioner had actually been interested in attempting justification, it could have moved the Commission to elect a limited number of instances upon which it would rely, and thus greatly reduced the scope of the defense necessary. It did not do so. In this connection, it should be noted that, although no issue upon the point was before the Commission when it decided the case, in its unanimous opinion the Commission commented upon the number of suppliers and the quantity of proof that had been adduced, as follows (R. 498):

\* \* \* \* Records or summaries of records of the prices at which more than seventy-five such manufacturers sold their candy,

gum, nuts, and other confectionery products covering a period of ten years were obtained by subpoena and introduced into evidence. The Commission is concerned with enforcement of the laws administered by it through the medium of orders to cease and desist. Competent proof of one or more violations would, in ordinary circumstances, be sufficient to establish a factual basis for such an order. The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by government counsel in the instant matter. Neither harassment of litigants nor the waste of government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name fourteen sellers as typical of a group from which respondent had induced or received discriminations in price, and certainly the records of not more than five of such sellers would have supplied ample evidence of such discriminations or price differentials.

(3). With respect to the accounting problem, petitioner presents its argument upon the basis of a full-dress distribution cost accounting study of the entire business of a seller. If lower prices negotiated with a seller were in fact based upon cost differences, and both parties to the transaction acted as reasonable and prudent people would, then the proof of justification is much simpler.

The cost-justification proviso excepts differentials “\* \* \* which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*” [Emphasis supplied.] Where a lower price has in fact been negotiated upon the basis of actual cost savings, obviously the differing methods or quantities would have been identified by the parties, as well as the amounts of any resulting savings. This would certainly be the case if the buyer were actually attempting in good faith to secure a reduction in price warranted by the methods or quantities in which he bought. Therefore, it should not be difficult to elicit through the testimony of the parties to the negotiation the items of savings which come within the terms of the proviso and which had been taken into account in arriving at the lower price. It should then be possible to develop, item by item, the facts supporting the savings believed to have been made.

In proceedings before the Commission involving cost accounting, if the parties concerned are willing to follow such procedure, it is normal to dispense with the production of records. In these instances the Commission checks, at the offices of the party who supplied the information, the facts and data which may be produced at the

hearing. Contrary to petitioner's suggestion (Pet. Br., pp. 47, 52), the Commission, in proper instances, regularly affords to parties respondent before it the use of compulsory process to assist them in putting in their defense.

In considering accounting data presented before the Commission in justification of price discriminations, reasonable allowance is necessarily made for the circumstances which may exist whenever a good-faith effort is being made by the party concerned. This is illustrated by the comment contained in the opinion of the Commission in its proceeding against the Minneapolis-Honeywell Regulator Company, 44 F. T. C. 351, 394:

Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. \* \* \* respondent's effort represents a fair and objective study of the problem which was probably done as well as it could be done under the circumstances. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive ef-

forts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error.

In short, neither the present record nor facts of general knowledge support petitioner's assertion of impossibility of proof. There is no occasion here to determine the precise quantum of proof which might have been required of petitioner had it attempted to meet its statutory burden. It may be assumed that the Commission will require no greater degree of proof than is reasonable under the circumstances. And if, in a particular case, it should appear that the Commission had imposed a burden heavier than Congress intended or the Constitution permits, means of correction would certainly be available to a reviewing court. No such questions are presented here, however, since petitioner made no attempt whatever to show justification.

### III

#### PETITIONER IS NOT ENTITLED TO TRY ITS CASE IN PIECEMEAL FASHION

Petitioner complains that it was unduly prejudiced because the court below refused to remand this case to the Commission, to permit petitioner to establish that it would be impossible for it to prove cost justification, and petitioner impliedly

suggests that this Court should order such a remand (Pet. Br., pp. 55-56). It is true that petitioner did move the court below for leave to adduce additional evidence,<sup>22</sup> but it waited until after the case had been decided against it before seeking this avenue of escape from the effect of an order.

Petitioner has been under no misapprehension as to the Commission's interpretation of Section 2 (f). Nevertheless, in the proceedings before the Commission it did nothing but insist on its own interpretation of the statute.<sup>23</sup> It petitioned for review on the basis of that interpretation; and, after an adverse decision, asked for a rehearing still urging that interpretation. Then, almost as an after-thought, it moved for leave to adduce additional evidence, apparently not for the purpose of making a good faith attempt to show justification, but simply to show that "such proof is not available, or is impossible." (R. 534.)

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<sup>22</sup> Petitioner based its request on Section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. 21) the pertinent provision of which is:

\* \* \* If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. \* \* \*

The court below was clearly correct in refusing (R. 537),

\* \* \* \* a new hearing on a new theory of defense after [petitioner] has had an adverse decision as to the theory originally relied upon in full and fair hearing before the Commission, and review of all issues raised on the record as made in that hearing.

It is plain that there were no reasonable grounds for failure even to try to produce evidence in defense when the proceeding was before the Commission. A belief that the Commission had not made out a *prima facie* case is not an excuse.<sup>23</sup> Neither is the belief that the statute was unconstitutional any excuse.<sup>24</sup> The statutory provision

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<sup>23</sup> *National Labor Relations Board v. Aluminum Products Co.*, 120 F. 2d 567, 573 (C. A. 7). See also, *Colorado Radio Corporation v. Federal Communications Commission*, 118 F. 2d 24, 26 (C. A. D. C.), in which the denial by the agency of a motion to submit additional evidence after final administrative action had been taken was sustained, the court saying:

Appellant took its chance that the Commission, on the existing record, would revert to its previous decision although it had been set aside. Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

<sup>24</sup> *National Labor Relations Board v. Anwelt Shoe Mfg. Co.*, 93 F. 2d 367, 372 (C. A. 1):

The third alleged excuse for refusing to try the merits of the cases at the time the hearings were had or to avail

respecting leave to adduce additional evidence "in effect formulates a familiar principle regarding newly discovered evidence," *Labor Board v. Donnelly Company*, 330 U. S. 219, 234. As this Court observed in *Southport Petroleum Company v. Labor Board*, 315 U. S. 100, 104: "To ensure that [the petition] would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board."<sup>25</sup>

The motion was addressed to the discretion of the court. Clearly petitioner was unable to and did not bring its request within the terms of the statute. To have granted the motion in the circumstances of this case would have established a rule, different from that heretofore applied,

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themselves of an opportunity to put in evidence later before the Board, at some reasonable time to be fixed for so doing, is an alleged belief of the respondents and their attorney that the act was unconstitutional. If every respondent charged with the violation of a federal act could be allowed to set up, as a reason for refusing to try his case when brought on for hearing, that the act, in his judgment, was unconstitutional, little progress could be made in the orderly trial of such causes.

<sup>25</sup> The provisions of the National Labor Relations Act being construed were in substance identical with the provisions of Section 11 of the Clayton Act, sought to be invoked by petitioner.

and one which would create innumerable opportunities for delaying the adjudication of proceedings of this type.

#### IV

##### PETITIONER'S PREDICTIONS OF THE DESTRUCTION OF COMPETITION ARE UNWARRANTED

It appears to us that petitioner, having conducted its purchasing operations in disregard of the law, now attempts to save itself by asserting that, if enforced, the law will destroy price competition. Petitioner's brief is interlarded throughout with various statements to the effect that bargaining between sellers and buyers would be impossible, that buyers will fear to purchase except at the highest price, and that effective price competition will disappear. If petitioner means competition based upon price discriminations having no cost or other economic justification, it is correct; but as to price competition not so based, its contentions are reacheed upon erroneous assumptions. Although petitioner's contentions in this regard are more properly addressed to Congress than to the Court, we believe it appropriate to point out that the impact of the Act, as construed below, is far less drastic than petitioner asserts it to be.

There is no doubt that Congress intended to prevent large buyers from obtaining a competitive advantage over small buyers merely because

of their size and purchasing power. It is also plain that in doing this, there was no intention to interfere with routine business transactions. To strike a balance conforming to these broad purposes Congress limited the application of Section 2 (f) to prohibited discriminations "knowingly" obtained. The legislative history ascribes to the word "knowingly" the connotation of discriminatory prices resulting from special solicitation, negotiation, or other arrangement. Under this construction the buyer would not be responsible for prices which are received in the ordinary course of business, including quantity or other discounts under an open scale of prices, even though some of those prices may actually be unlawful discriminations, unless such discriminatory prices were the result of his own activities.

In addition, the statute and its legislative history make it clear that Congress intended that a seller might grant and a buyer might receive a discriminatory price, if the price made no more than due allowance for savings in cost to the seller resulting from the quantities or methods of sale and delivery. And, as we have pointed out (*supra*, p. 45), where the buyer in good faith has sought only such prices as can be so justified, he will be in a position to establish justification.

The type of transaction to which Section 2 (f) applies is thus limited to special prices which result from the activities of the buyer and which

cannot be justified by costs. Its area of practical application in the field of business as a whole is also limited. It is common knowledge that generally in businesses involving sales by producers to buyers who are engaged in the further distribution of the products purchased; the small and ordinary buyer is in no position to and does not obtain special prices. He is but one of a large group of customers and his trade is not important enough to the producer to enable him to secure special treatment. In fact, in the case of well-known products having wide consumer acceptance—as is the case with a tremendous volume of consumer goods—he is frequently an applicant for an opportunity to purchase rather than an applicant for special prices. It is only the larger buyer, whose individual business is of real importance to the seller, that occupies a bargaining position enabling him to secure special treatment. The number of large buyers is relatively small, and once lost as a customer such a buyer may not be readily replaced. Individually, such buyers therefore occupy a different position with a seller than does the ordinary customer.

Section 2 (a) of the statute clearly informs the seller that discriminations in price which may injure competition are unlawful, and if he grants such discriminations without ascertaining whether he has legal justification, he is not heard

to complain if he later finds himself unable successfully to justify them. Congress determined the public policy which forbids discriminations the effect of which "may be" injurious to competition, and provided the nature and limit of the justifications that might be made. These are based upon economic and competitive considerations. Section 2 (f) applies the same principle to buyers. Both buyer and seller know that special prices which may injuriously affect competition involve a risk of statutory violation to each of them, and they have an obligation to act in a prudent manner. Thus, in those instances where a buyer's own actions contribute to obtaining for himself a special and discriminatory price, he should accept responsibility for his actions if the price is not cost justified and adverse effects upon competition follow.

All these factors indicate the practical area of application of Section 2 (f); that the parties affected are not without means of protecting themselves; and that Section 2 (f) does not prevent large buyers from obtaining in the form of a lower price the benefit of savings they can make for the seller. Section 2 (f) does no more than Congress intended—aid in restoring equality of opportunity in business by preventing large buyers from recklessly using their size, power, and position to exact sacrificial price discriminations that are without economic justification.

**CONCLUSION**

For the foregoing reasons, the judgment of the court below should be affirmed except as to the order of enforcement. As to that order it should be reversed.

Respectfully submitted,

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JAMES E. CORKEY,  
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No. 89

IN THE

Supreme Court of the United States

October Term, 1952

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

National Candy Wholesalers Association, Inc.,  
Movant

MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE

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To the Honorable, The Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:

Now comes the National Candy Wholesalers Association, Inc., and respectfully moves this Court, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief amicus curiae in this case. The consent of the attorney for the respondent herein to the

filing of a brief has been obtained and filed with the Clerk of the Court. The consent of the attorneys for the petitioner was requested but was refused. The interest of the National Candy Wholesalers Association, Inc., and its reasons for asking leave to file a brief *amicus curiae* are set forth below.

Movant, a corporation organized under the laws of Maryland, is a national non-profit trade association. As provided in movant's by-laws, its purpose is "to promote the best interests of the wholesale distributors of candy and to unite the members of the wholesale confectionery industry in all lawful measures for its common good," and its active members are "individuals, firms or corporations selling at wholesale confectionery products other than those of their own manufacture," of which there are now approximately 1,000 in number, doing business in 47 states.

Candy wholesalers, including members of movant, are in substantial competition in many areas with petitioner in this proceeding and have been discriminated against by the more favorable prices and terms which the petitioner was found to have knowingly induced and received. (Transcript of Record, in the Court of Appeals for the Seventh Circuit, pp. 250-253, 266-267, 288-289).

The movant, over the protest of the petitioner before this Court, was permitted to intervene in the proceedings before the Federal Trade Commission to the extent of filing written briefs on the merits and presenting oral argument before the Commission (ETC Docket No. 4933, Order Granting In Part the Application of National Candy Wholesalers, Inc., September 19, 1947). The brief of the National Candy Wholesalers Association, Inc., as intervenor on the Motion to Dismiss of Automatic Canteen Company of America (petitioner here), was filed before

the Commission on October 31, 1947, and counsel presented oral argument November 6, 1947.

Again, in the review of the Order of the Federal Trade Commission before the United States Court of Appeals for the Seventh Circuit, by that Court's order dated July 31, 1951, movant was granted leave to file a brief as *amicus curiae*; and subsequently by order dated December 5, 1951, counsel for movant was granted leave to present oral argument. Movant's brief was filed on December 3, 1951, and oral argument was presented by counsel on December 6, 1951.

The Acting Solicitor General of the United States has consented to movant's filing a brief *amicus curiae* before this Honorable Court, in view of its participation in the case before the Commission and the Court of Appeals. Counsel for petitioner have denied consent.

The interest of the movant is in that part of the Order of the Federal Trade Commission which directs petitioner herein to cease and desist from knowingly inducing or receiving discriminations in price in violation of section 2(f) of the Clayton Act as amended by the Robinson-Patman Act. (Oct. 15, 1914, c. 323, section 2, 38 Stat. 730; June 19, 1936, c. 592, section 1, 49 Stat. 1526; 15 U. S. C., section 13).

Specifically, movant asks leave to present to this Court argument and authority in support of the following proposition as the correct rule on the questions presented by petitioner:

In order to establish a *prima facie* case that a person has knowingly induced or received a discrimination in price prohibited by section 2 of the Clayton Act as amended by the Robinson-Patman Act, it is not necessary to prove that the differentials in

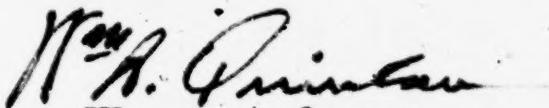
question made more, and that such person knew they made more, than due allowance for differences in the sellers' costs of manufacture, sale or delivery resulting from the differing methods or quantities in which the products were sold. Rather, it is sufficient to establish, as the Commission has done, that the purchaser knowingly induced or received price differentials which were discriminatory in that they represented prices known by such purchaser to be less than those charged for products of like grade and quality to other purchasers with which it was in competition. If the knowing inducement or receipt of such a discrimination in price is established, the burden is then upon the purchaser to show that the discrimination was permissible under one or more of the provisos in section 2 of the Act.

Movant is of the opinion that in addition to the statutory construction and legislative history of the Act in question, the principle upon which *Burnet v. Houston* (1931), 283 U. S. 223, was decided justifies the above statement of the law; and that the enforcement of the Act so construed is not impracticable or oppressive in the conduct of commercial transactions. The application of *Burnet v. Houston* was not briefed or argued by counsel for either petitioner or respondent in the court below; and respondent Commission did not, it is submitted, fully present argument that its construction of the Act does not lead to unjust and oppressive results, but rather does lead to the objective for which the Robinson-Patman Amendment to the Clayton Act was enacted.

## CONCLUSION

Movant and its counsel have followed and participated in this case continuously since movant's intervention before the Federal Trade Commission in 1947. Movant believes and respectfully submits to this Honorable Court that by filing a brief amicus curiae it can contribute to a sound determination of the issue involved.

Respectfully submitted,



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November, 1952